Supreme Judicial Court for the Commonwealth DAR: DAR-25907 Filed: 2/9/2018 4:02:26 PM

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BRISTOL, ss. DAR -
APPEALS COURT No. 2018-P-0087

COMMONWEALTH

V.

AARON J. HERNANDEZ

COMMONWEALTH'S PETITION FOR DIRECT APPELLATE REVIEW

Respectfully submitted,
THOMAS M. QUINN, III
District Attorney

Shoshana E. Stern
Assistant District Attorney
Bristol District
P.O. Box 973
888 Purchase Street
New Bedford, MA 02740
(508) 997-0711
BBO # 667894
shoshana.e.stern@state.ma.us

REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11(a), the Commonwealth moves this Court to grant direct appellate review on the questions of whether the doctrine of abatement *ab initio* should continue to be applied in its current form in the courts of Massachusetts, and whether, if so, it should be applied in the case of a defendant who commits suicide with the goal of abating his conviction.

STATEMENT OF PRIOR PROCEEDINGS

On April 15, 2015, following a trial that had lasted more than three months, a Bristol Superior Court jury (Garsh, J., presiding) found Aaron Hernandez guilty of first-degree murder on a theory of extreme atrocity or cruelty (G.L. c. 265, § 1), carrying a firearm without a license (G.L. c. 269, § 10(a)), and unlawful possession of ammunition (G.L. c. 269, § 10(h)) [RA 44]. Judge Garsh sentenced him to life in prison without the possibility of parole for murder, and to concurrent terms of 2½-3 years and one year in state prison on the firearm and ammunition charges [RA 44-45]. He received 659 days of jail credit [RA 45].

On April 20, 2017, the defense filed a Motion to Abate Prosecution and Notification of Death of Defendant-Appellant Aaron Hernandez [RA 57]. The Commonwealth filed an opposition to the motion on May 1st; further filings were made by both parties, and a hearing was held before Judge Garsh on May 9th [RA 57-58]. On that same day, she issued a Memorandum and Order allowing the Motion to Abate Prosecution, vacating Hernandez's convictions, and dismissing the underlying indictments and notice of appeal [RA 58, 65-75].

On May 12, 2017, the Commonwealth moved to dismiss its remaining untried indictments against Hernandez, and on May 15th the motion was allowed [RA 58-59].

On October 24, 2017, with leave of a Single Justice of this Court (Lowy, J.), the Commonwealth filed a Notice of Appeal from the allowance of the Motion to Abate Prosecution [RA 59, 63]. The defense moved to strike the notice of appeal, which McGuire, J., endorsed, "No action taken as defense counsel's authority to represent the defendant terminated on his death. *Chandler v. Dunlop*, 311 Mass. 1, 5 (1942)" [RA 59]. On November 29th the defense filed a "Motion to

Reconsider Sua Sponte Order barring consideration of Motion to Strike Notice of Appeal and purporting to Disqualify Counsel and Memorandum in Support thereof," which Judge McGuire denied on December 4th [RA 59]. The defense had also asked Justice Lowy to reconsider his decision allowing the Commonwealth leave to appeal; he denied this motion on January 19, 2018 [RA 63-64].

On January 22nd, the defense filed a "Request for Reciprocal Assistance of the Court" before the Single Justice, seeking a right to file a cross-appeal challenging the admission of certain evidence at the abatement hearing [RA 64]. This does not appear to have been acted on.

On January 23, 2018, this case was entered in the Appeals Court.

STATEMENT OF RELEVANT FACTS

On the morning of April 19, 2017, slightly more than two years after his convictions, and while his appeal was pending, the defendant hanged himself at the Souza-Baranowski Correctional Center. The defendant had blocked the windows of his cell, apparently to avoid being seen by guards during wellness checks. Further, he jammed cardboard into the track of the cell door to impede access by rescuers or

others. He left three handwritten notes evidencing his intention to kill himself. In one of those notes, addressed to his fiancée and the guardian of their child, he stated: "YOURE RICH." The death certificate, dated April 20, 2017, lists the manner of death as "suicide."

The next day, on April 20, 2017, Hernandez's appellate attorneys filed a motion in the Superior Court seeking abatement *ab initio* of all of his convictions and dismissal of the indictments. Although the trial judge (Garsh, J.) acknowledged "the harsh emotional effects of abatement on victims and their families," she indicated that she was "constrained to conclude that victims' rights statutes do not alter the longstanding and controlling practice of abatement of criminal proceedings" [RA 68].

ISSUES OF LAW RAISED BY THE APPEAL

I. Should abatement *ab initio* continue to be the common law in Massachusetts, and if so, is the public entitled to an explanation of why this doctrine continues to be the best policy notwithstanding the costs to victims and to the public sense of justice?

II. Even if abatement *ab initio* continues to apply in the majority of cases, should it apply in the case of a defendant who has committed suicide with the intention of causing his convictions to be abated?

Both issues were raised below, in the Commonwealth's opposition to the defense's motion for abatement of Hernandez's convictions. Following Judge Garsh's allowance of the motion, the Commonwealth sought to bring consideration of both issues before this Court by means of a petition pursuant to G.L. c. 211, § 3, asking the Single Justice to reserve and report the case to the full panel. Justice Lowy ultimately denied the petition on the ground that the Commonwealth had a right of appeal, and granted the Commonwealth permission to file a late notice of appeal by a date certain, stating that, "Should the case be appealed, this Court will give consideration to an application for direct appellate review" [RA 63]. The Commonwealth filed a notice of appeal within the time frame set forth by the Single Justice [RA 59, 69].

ARGUMENT

THE IMPORTANT CONSIDERATIONS IMPLICATED WHEN A CRIMINAL DEFENDANT DIES DURING THE PENDENCY OF HIS DIRECT APPEAL ARE IN NEED OF A MORE THOROUGH TREATMENT THAN THEY HAVE THUS FAR RECEIVED IN MASSACHUSETTS. THE SUPREME JUDICIAL COURT IS THE PROPER FORUM, AS THIS IS A MATTER CURRENTLY GOVERNED ENTIRELY BY COMMON LAW, AND THIS COURT IS THE INSTITUTION "RESPONSIBLE FOR THE CONTENT OF THAT COMMON LAW."

The question of what future, if any, the doctrine of abatement *ab initio* should have in this Commonwealth is an appropriate and timely one for this Court to consider. The doctrine is a matter of common law: its existence and scope in Massachusetts are defined entirely by a handful of decisions of this Court. *Commonwealth v. De Le Zerda*, 416 Mass. 247, 250 (1993); *Commonwealth v. Latour*, 397 Mass. 1007 (1986); *Commonwealth v. Harris*, 379 Mass. 917 (1980); *Commonwealth v. Eisen*, 368 Mass. 813, 814 (1975). See *United States v. Parsons*, 367 F.3d 409, 414 (5th Cir. 2004) ("Given that the doctrine of abatement ab initio is largely court-created and a creature of the common law, the applications of abatement are more amenable to policy and equitable arguments.") [RA 79]. While it is within the power of the Legislature to weigh in on this issue should it choose to do so, it is equally appropriate for this Court, as custodian of the common law, to give consideration to a doctrine that has to date been entirely its creation.[1]

[1] Indeed, the Supreme Court of Virginia, having conducted its own review of the issue in 2011, concluded that under the constitution and statues of Virginia the relevant questions of policy should be left to the legislature, but that abatement *ab initio* should not apply in Virginia *unless* the legislature

Nor would doing so be outside the scope of this Court's practice. Earlier this year, a majority of this Court abolished common-law felony-murder in Massachusetts - a change to the criminal legal landscape of far greater consequence than anything relating to the criminal record of a deceased defendant could possibly be. The concurring opinion that effected this change deals at great length with the relatively recent origins of the doctrine of felony-murder, the complex circumstances in which it arose, and the logical problems it had long posed when viewed in the broader context of our criminal law. The concurrence concludes:

> Felony-murder liability is a creation of our common law, and this court is responsible for the content of that common law. When our experience with the common law of felony-murder liability demonstrates that it can yield a verdict of murder in the first degree that is not consonant with justice, and where we recognize that it was

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saw fit to adopt it. *Bevel v. Commonwealth*, 717 S.E.2d 789, 794-795 (Va. 2011) ("We conclude that if it is to be the policy in Virginia that a criminal conviction necessarily will abate upon the death of the defendant while an appeal is pending and whether there should be a good cause exception in that policy, the adoption of such a policy and the designation of how and in what court such a determination should be made is more appropriately decided by the legislature, not the courts. For these reasons, we hold that the Court of Appeals erred in applying the abatement doctrine to Bevel's criminal appeal." (internal citation omitted)) [RA 99-100].

> derived from legal principles we no longer accept and contravenes two fundamental principles of our criminal jurisprudence, we must revise that common law so that it accords with those fundamental principles and yields verdicts that are just and fair in light of the defendant's criminal conduct.

Commonwealth v. Brown, 477 Mass. 805, 836 (2017).

All of these considerations apply here. While Massachusetts has a statutory scheme for dealing with a circumstance in which a party to a civil case dies during the pendency of litigation, e.g., G.L. c. 228, §§ 1-11 & 14; c. 260, § 10; Mass. R. Civ. P. Rule 25, the legislature has never provided any guidance on what is to be done when a criminal defendant dies under similar circumstances. The first published court decision addressing the issue was handed down as recently as 1975, *Eisen*, 368 Mass. at 814 ("[w]hen a criminal defendant dies pending his appeal, normally the judgment should be vacated and the indictment dismissed. This is the general practice elsewhere."), and it and its successor cases have applied the doctrine of abatement *ab initio* elliptically, without ever giving due consideration to the question of why, or whether, this is the appropriate doctrine to apply in Massachusetts. *De Le Zerda*, 416 Mass. at 250 ("When a defendant dies while his conviction is on direct

review, it is our practice to vacate the judgment and remand the case with a direction to dismiss the complaint or indictment, thus abating the entire prosecution. . . . None of the policy reasons arguably supporting abatement of the entire proceeding applies here."); *Latour*, 397 Mass. at 1007 ("When a criminal defendant dies pending his appeal, the general practice is to dismiss the indictment. *Commonwealth v. Eisen*, 368 Mass. 813 (1975). There is nothing about the issues raised in this appeal that leads us to vary this general rule."); *Harris*, 379 Mass. at 917 ("If a criminal defendant dies while his appeal is under consideration, normally the judgment should be vacated and the indictment dismissed. *Commonwealth v. Eisen*, 368 Mass. 813 (1975). Neither the asserted importance of the issues nor any personal interest in the defendant's vindication is sufficient to warrant deciding the appeal. *Id.* at 814. Counsel have not presented any other reason why we should decide this appeal.").

It is not a question that answers itself: other states deal with the issue in a variety of different ways. See *Brass v. State*, 325 P.3d 1256, 1257 (Nev. 2014), and cases cited ("There are three general

approaches when a criminal defendant dies while his or her appeal from a judgment of conviction is pending: (1) abate the judgment ab initio, (2) allow the appeal to be prosecuted, or (3) dismiss the appeal and let the conviction stand.") [RA 89]. There has never been a single national consensus on the issue, and even the "general practice" cited in *Eisen* has been diminishing, as state after state gives greater and lengthier consideration to the competing interests and principles implicated, particularly the growing emphasis on the rights of victims. This consideration has frequently occurred in the form of a lengthy and reasoned analysis of the issue by the state's court of last resort. See, e.g., *Brass*, 325 P.3d at 1256 [RA 88-90]; *State v. Benn*, 274 P.3d 47 (2012) [RA 91-94]; *Bevel v. Commonwealth*, 717 S.E.2d 789 (2011) [RA 95-101]; *State v. Carlin*, 249 P.3d 752 (Alas. 2011) [RA 102-113]; *State v. Devin*, 142 P.3d 599 (Wash. 2006) [RA 114-120]; *Surland v. State*, 895 A.2d 1034 (Md. 2006) [RA 121-132]; *State v. Korsen*, 111 P.3d 130 (Ida. 2005) [RA 133-137]; *State v. Makaila*, 897 P.2d 967 (Haw. 1995) [RA 138-142]; *People v. Peters*, 537 N.W.2d 160 (Mich. 1995) [RA 143-149]; *State v. McDonald*, 424 N.W.2d 411 (Wis. 1988) [RA 150-157]; see

also *State v. Burrell*, 837 N.W.2d 459 (Minn. 2013) (deciding in favor of adopting abatement *ab initio*) [RA 158-167]. Massachusetts would benefit from its own such decision: abatement *ab initio* is not an intuitive doctrine, and if this Commonwealth is to continue to apply it, its people deserve a full and fair explanation of why the public justice requires it.

Furthermore, consideration of this area of law by this Court is warranted because even if the underlying doctrine of abatement *ab initio* is to remain, there are important questions regarding its application that have not yet been answered. As matters currently stand, there is not even any guidance in Massachusetts law as to who has standing to represent the interests of a deceased defendant in a criminal case – a matter which has caused confusion in the course of the present litigation. More broadly, there are unanswered questions about the scope of the doctrine itself. Within this past year, this Court, citing *De La Zerda*, ruled that in the case before it "the interests of justice" warranted departure from the rule established in *De La Zerda*, and considered the further appellate review claims of a defendant who had died after the Appeals Court ruled on his case, and thus would not

ordinarily be entitled to review. *Commonwealth v. Squires*, 476 Mass. 703, 707-707 (2017). Such a ruling naturally raises the question of what other circumstances might also warrant such an exception to usual practice in the interests of justice.

The instant case presents the question of whether a convicted criminal defendant can guarantee that his conviction will be vacated by killing himself.[2] If the answer to this question is "yes" in all circumstances, it would provide some number of defendants with a perverse incentive to suicide. It also provides an opportunity for defendants in particular factual scenarios to game the system - for instance ensuring that money owed in restitution remains with their heirs rather than being paid to their victims - in ways that are fundamentally contrary to public justice. More broadly, it risks creating an impression in the mind of the public that the defendant "got away with it" or "escaped justice," thereby diminishing

[2] There are contested factual issues surrounding the applicability of this scenario to Mr. Hernandez, which the parties continue to disagree on and the motion judge did not resolve. It is not necessary for this Court to resolve those factual disputes in order to provide guidance about the law to be applied to cases that, like this one, raise such an issue.

public faith in the justice system without providing anything of equal value in return.

But the issue is a complicated one, which is all the more reason why it warrants the consideration of this Court. There are, as the motion judge noted [RA 71-74], many reasons a person might commit suicide, and any one person may have multiple motivations for doing any single action. The Commonwealth suggests that a reasonable way to draw the line would be a test like that applied in *Commonwealth v. Szerlong*, 457 Mass. 858 (2010), which held that a defendant may forfeit his right to confront a witness by marrying her, and that in making such a determination it is necessary only that making the witness unavailable have been *a* reason for the marriage, rather than the *only* reason. *Szerlong*, 457 Mass. at 865 ("The judge did not need to find that making [the victim] unavailable as a witness was the defendant's sole or primary purpose in marrying her; it is sufficient that it was a purpose in marrying her."); see also *Commonwealth v. Edwards*, 444 Mass. 526, 542 ("The forfeiture by wrongdoing doctrine as we have articulated it above, contains no independent 'wrongdoing' requirement.") Similarly, a defendant's

conviction could stand if a judge found that one of his motivations in killing himself was to void his conviction, without its being necessary to find that that was his only motivation. Such a rule would prevent the justice system and the public trust from being taken advantage of, while providing that a defendant who killed himself with no evidence that he did so in an effort to manipulate the course of justice would be treated like any other defendant.

Whatever the answers to these questions are ultimately determined to be, they are important questions, timely ones, and ones that subsidiary courts lack the full power to consider. The Supreme Judicial Court is the proper forum for consideration of this case.

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

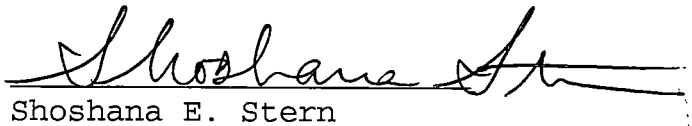
Direct appellate review is appropriate in this case because it presents a "question[] of first impression or novel question[] of law which should be submitted for final determination to the Supreme Judicial Court," as well as a " question[] of such public interest that justice requires a final

determination by the full Supreme Judicial Court." Mass. R. App. P. 11(a).

As explained in the Argument, above, this case presents a combination of novel questions of law, and matters of public interest which this Court has resolved elliptically in past decisions but has never fully addressed. At the root of all of these are questions about what the shape of the common law of Massachusetts should be going forward, and what shape it is necessary to have it take in order for justice not only to be done, but to be seen to be done. For all of these reasons, direct appellate review is not only appropriate, but also necessary.

Respectfully submitted,

THOMAS M. QUINN, III
District Attorney



Shoshana E. Stern
Assistant District Attorney
Bristol District
BBO # 667894
888 Purchase Street
New Bedford, MA 02741
(508) 997-0711
shoshana.e.stern@state.ma.us

RECORD

APPENDIX

Table Of Contents

CASES

1373CR00983 Commonwealth vs. Hernandez, Aaron J

Case Type	Indictment	Initiating Action:	MURDER c265 §1
Case Status	Open	Status Date:	08/22/2013
File Date	08/22/2013	Case Judge:	
DCM Track:	C - Most Complex	Next Event:	

All Information | Party | Charge | Event | Ticker | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Party Attorney

Attorney	Bomberg, Esq., Patrick Otto
Bar Code	566805
Address	Bristol County District Attorney 888 Purchase St PO Box 973 New Bedford, MA 02740
Phone Number	(508)997-0711
Attorney	Mark, Esq., David B
Bar Code	320510
Address	Office of the District Attorney, Bristol District 888 Purchase St New Bedford, MA 02740
Phone Number	(508)961-1868
Attorney	McCauley, Esq., William M
Bar Code	562635
Address	Bristol County District Attorney's Office 888 Purchase St New Bedford, MA 02740
Phone Number	(508)961-1802
Attorney	Michel, Jr., Esq., Roger Lee
Bar Code	555160
Address	Bristol County District Attorney 888 Purchase St 5th Floor New Bedford, MA 02742
Phone Number	(508)961-1867

More Party Information

Hernandez, Aaron J - Defendant

Alias

Party Attorney

Attorney	Carey, Esq., Laura
Bar Code	691940
Address	Latham & Watkins 200 Clarendon St Boston, MA 02116
Phone Number	(617)880-4536
Attorney	Fee, Esq., Michael Kelley
Bar Code	544541
Address	Latham & Watkins LLP John Hancock Tower 200 Clarendon Street Boston, MA 02116
Phone Number	(617)880-4600

Attorney	Thompson, Esq., John M
Bar Code	496780
Address	Thompson & Thompson PC 1331 Main St Suite 320 Springfield, MA 01103
Phone Number	(413)739-2100
Attorney	Thompson, Esq., Linda J
Bar Code	496840
Address	Thompson & Thompson PC 1331 Main St Suite 320 Springfield, MA 01103
Phone Number	(413)739-2100

More Party Information

WBZ-TV - Keeper of Record

Alias

Party Attorney

More Party Information

WCVB-TV - Keeper of Record

Alias

Party Attorney

More Party Information

WHDH-TV - Keeper of Record

Alias

Party Attorney

More Party Information

WFXT-TV - Keeper of Record

Alias

Party Attorney

More Party Information

NECN-TV - Keeper of Record

Alias

Party Attorney

More Party Information

New England Patriots - Keeper of Record

Alias

Party Attorney

Attorney	Goldberg, Esq., Daniel L
Bar Code	197380
Address	Morgan, Lewis & Bockius LLP One Federal St Boston, MA 02110
Phone Number	(617)951-8327
Attorney	Phelan, Esq., Andrew C
Bar Code	643160
Address	Morgan, Lewis & Bockius LLP 1 Federal St Boston, MA 02110
Phone Number	(617)951-8000

More Party Information

GateHouse Media, LLC - Other Interested party

Alias

Party Attorney

Attorney	Bryan, Esq., Emily Hannigan
Bar Code	687935
Address	Greenberg Traurig LLP One International Place Suite 2000 Boston, MA 02110
Phone Number	(617)310-6000
Attorney	Kleinsasser, Esq., Zachary
Bar Code	664291
Address	Greenberg Traurig LLP One International Place Boston, MA 02110
Phone Number	(617)791-1574

More Party Information

Hanifin, Laura - Other interested party

Alias

Party Attorney

More Party Information

AMS Pictures - Other interested party

Alias

Party Attorney

More Party Information

Party Charge Information

Hernandez, Aaron J - Defendant

Charge # 1 :

265/1-0 - Felony MURDER c265 §1

Original Charge	265/1-0 MURDER c265 §1 (Felony)
Indicted Charge	
Amended Charge	

Charge Disposition

Disposition Date	Disposition
04/15/2015	Guilty Verdict

Hernandez, Aaron J - Defendant

Charge # 2 :

269/10/J-1 - Felony FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)

Original Charge	269/10/J-1 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) (Felony)
Indicted Charge	
Amended Charge	

Charge Disposition

Disposition Date	Disposition
04/15/2015	Guilty Verdict

Hernandez, Aaron J - Defendant

Charge # 3 :

269/10/G-2 - Misdemeanor - more than 100 days incarceration FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)

Original Charge	269/10/G-2 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) (Misdemeanor - more than 100 days incarceration)
Indicted Charge	
Amended Charge	

Charge Disposition
Disposition Date
Disposition
05/15/2017
Dismissed - Defendant
Deceased

Hernandez, Aaron J - Defendant

Charge # 4 :

269/10/AA-0 - Felony FIREARM, POSSESS LARGE CAPACITY c269 §10(m)

Original Charge	269/10/AA-0 FIREARM, POSSESS LARGE CAPACITY c269 §10(m) (Felony)
Indicted Charge	
Amended Charge	

Charge Disposition
Disposition Date
Disposition
05/15/2017
Dismissed - Defendant
Deceased

Hernandez, Aaron J - Defendant

. Charge # 5 :

269/10/G-2 - Misdemeanor - more than 100 days incarceration FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)

Original Charge	269/10/G-2 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) (Misdemeanor - more than 100 days incarceration)
Indicted Charge	
Amended Charge	

Charge Disposition
Disposition Date
Disposition
05/15/2017
Dismissed - Defendant
Deceased

Load Party Charges 6 through 6 Load All 6 Party Charges

Events

Date	Session	Location	Type	Event Judge	Result
09/06/2013 02:00 PM	Criminal 1 (Fall River)		Arraignment		Held as Scheduled
10/09/2013 02:00 PM	Criminal 1 (Fall River)		Pre-Trial Conference		Held as Scheduled
10/21/2013 02:30 PM	Criminal 1 (Fall River)		Hearing		Held as Scheduled
12/13/2013 02:30 PM	Criminal 1 (Fall River)		Pre-Trial Conference		Not Held
12/23/2013 02:30 PM	Criminal 3 (Fall River)		Pre-Trial Conference		Held as Scheduled
12/23/2013 02:30 PM	Criminal 1 (Fall River)		Pre-Trial Conference		Not Held
01/08/2014 08:30 AM	Criminal 3 (Fall River)		Status Review		Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
01/15/2014 08:30 AM	Criminal 3 (Fall River)		Status Review		Held as Scheduled
02/05/2014 02:30 PM	Criminal 1 (Fall River)		Hearing RE: Discovery Motion(s)		Rescheduled
02/07/2014 02:30 PM	Criminal 1 (Fall River)		Hearing RE: Discovery Motion(s)		Held as Scheduled
02/14/2014 08:30 AM	Criminal 3 (Fall River)		Status Review		Held as Scheduled
04/30/2014 08:30 AM	Criminal 3 (Fall River)		Status Review		Rescheduled
05/14/2014 08:30 AM	Criminal 3 (Fall River)		Status Review		Held as Scheduled
05/30/2014 08:30 AM	Criminal 3 (Fall River)		Status Review		Not Held
06/13/2014 12:00 PM	Criminal 3 (Fall River)		Status Review		Held as Scheduled
06/16/2014 09:00 AM	Criminal 3 (Fall River)		Non-Evidentiary Hearing on Motion to Suppress		Held as Scheduled
06/16/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Non-Evidentiary Hearing on Motion to Dismiss	Garsh, Hon. E. Susan	Held as Scheduled
06/16/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Pre-Trial Hearing	Garsh, Hon. E. Susan	Held as Scheduled
06/18/2014 09:30 AM	Criminal 3 (Fall River)	Courtroom 6	Evidentiary Hearing	Garsh, Hon. E. Susan	Held as Scheduled
07/07/2014 02:00 PM	Criminal 3 (Fall River)	Courtroom 6	Hearing on Compliance	Garsh, Hon. E. Susan	Held as Scheduled
07/09/2014 02:00 PM	Criminal 1 (Fall River)	Courtroom 9	Motion Hearing	Veary, Jr., Hon. Raymond P	Held as Scheduled
07/14/2014 04:00 PM	Criminal 3 (Fall River)	Courtroom 6	Status Review	Garsh, Hon. E. Susan	Held as Scheduled
07/21/2014 04:00 PM	Criminal 3 (Fall River)	Courtroom 6	Status Review	Garsh, Hon. E. Susan	Held as Scheduled
07/22/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Conference to Review Status	Garsh, Hon. E. Susan	Held as Scheduled
07/22/2014 12:00 PM	Criminal 3 (Fall River)	Courtroom 6	Conference to Review Status	Garsh, Hon. E. Susan	Rescheduled
07/22/2014 02:00 PM	Criminal 3 (Fall River)	Courtroom 6	Hearing on Dwyer Motion	Garsh, Hon. E. Susan	Rescheduled
07/22/2014 02:00 PM	Criminal 1 (Fall River)	Courtroom 9	Hearing on Dwyer Motion	Veary, Jr., Hon. Raymond P	Canceled
08/11/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
09/30/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
10/01/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
10/02/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
10/08/2014 02:00 PM	Criminal 3 (Fall River)	Courtroom 6	Evidentiary Hearing on Suppression	McIntyre, Hon. Frances A	Held as Scheduled
10/20/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing		Rescheduled

Date	Session	Location	Type	Event Judge	Result
10/30/2014 12:15 PM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
11/06/2014 02:30 PM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing		Rescheduled
11/10/2014 11:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Nickerson, Hon. Gary A	Canceled
12/12/2014 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Nickerson, Hon. Gary A	Rescheduled
12/12/2014 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Final Pre-Trial Conference	Kane, Hon. Robert J	Held as Scheduled
12/22/2014 09:15 AM	Criminal 2 (Fall River)	Courtroom 7	Final Pre-Trial Conference	Kane, Hon. Robert J	Held as Scheduled
01/06/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Final Pre-Trial Conference		Held as Scheduled
01/06/2015 02:00 PM	Criminal 3 (Fall River)	Courtroom 6	Conference to Review Status	Garsh, Hon. E. Susan	Not Held
01/06/2015 02:00 PM	Criminal 2 (Fall River)	Courtroom 7	Conference to Review Status	Garsh, Hon. E. Susan	Held as Scheduled
01/07/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
01/09/2015 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Jury Trial	Garsh, Hon. E. Susan	Not Held
01/09/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/12/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/13/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/15/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/16/2015 08:30 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/20/2015 08:30 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/21/2015 08:30 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/22/2015 08:30 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/23/2015 08:30 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/26/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/27/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Canceled
01/28/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Canceled
01/29/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
01/30/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
			Jury Trial		Canceled

Date	Session	Location	Type	Event Judge	Result
02/02/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7		Garsh, Hon. E. Susan	
02/03/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/04/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/05/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/06/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/09/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Not Held
02/10/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Not Held
02/11/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/12/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Not Held
02/13/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/17/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/18/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/19/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/20/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/23/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/24/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/25/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/26/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
02/27/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/02/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/03/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/03/2015 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Jury Trial	Cosgrove, Hon. Robert C	Not Held
03/04/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/05/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/06/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/09/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
03/10/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/11/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/12/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/13/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/17/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/18/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/19/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/20/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/23/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/24/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/25/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
03/26/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/27/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/30/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
03/31/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/01/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/02/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/03/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/06/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/07/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/08/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/09/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/10/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/13/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
04/14/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7	Jury Trial	Garsh, Hon. E. Susan	Held as Scheduled
			Jury Trial		

Date	Session	Location	Type	Event Judge	Result
04/15/2015 09:00 AM	Criminal 2 (Fall River)	Courtroom 7		Garsh, Hon. E. Susan	Held as Scheduled
06/12/2015 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
09/25/2015 09:00 AM	Criminal 3 (Fall River)	Courtroom 6	Hearing RE: Discovery Motion(s)	Garsh, Hon. E. Susan	Held as Scheduled
10/23/2015 02:00 PM	Criminal 1 (Fall River)	Courtroom 9	Motion Hearing		Held as Scheduled
12/11/2015 03:00 PM	Criminal 3 (Fall River)	Courtroom 6	Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled
02/03/2016 08:30 AM	Criminal 1 (Fall River)	Courtroom 9	Status Review	Pasquale, Hon. Gregg J	Held as Scheduled
05/01/2017 02:00 PM	Criminal 2 (Fall River)		Status Review	Garsh, Hon. E. Susan	Canceled
05/09/2017 10:00 AM	Criminal 2 (Fall River)		Motion Hearing	Garsh, Hon. E. Susan	Held as Scheduled

Ticklers

Tickler	Start Date	Days Due	Due Date	Completed Date
Pre-Trial Hearing	09/06/2013	0	09/06/2013	05/16/2017
Final Pre-Trial Conference	09/06/2013	346	08/18/2014	05/16/2017
Case Disposition	09/06/2013	360	09/01/2014	05/16/2017
Review Appeals Filed	04/21/2015	30	05/21/2015	05/16/2017

Docket Information

Docket Date	Docket Text	File Ref Nbr.
08/22/2013	Indictment returned	1
09/04/2013	Notice (filed by C. Samuel Sutter, District Attorney)	2
09/05/2013	Correspondence regarding media protocols from Kevin Manahan, Senior Editor, NFL at USA Today Sports	3
09/05/2013	(P#3) With regard to the objections framed by Mr. Manahan, the Court respects the commitment USA today and other media outlets have invested in informing the public regarding this case. However, the Court will not pick-and-choose which media outlet is more worthy than another of the available courtroom seats because such would require an entirely subjective evaluative process. As inconvenient to some as this process may be, it is a transparent process fair to all media outlets. Courtroom Seven will be available for a live video feed for members of the media and the public who are unable to obtain seats in the First Session. One seat will be allotted to each media outlet. (Frances McIntyre, Justice). Copy e-mailed 9/5/2013	
09/05/2013	Correspondence regarding Defendant's Position on Use of a Room Inside the Bristol County Superior Courthouse to Hold a Press Conference by the District Attorney	3.1
09/06/2013	Defendant arraigned before Court (McIntyre, J.) jtv	
09/06/2013	RE Offense 1: Plea of not guilty	

Docket Date	Docket Text	File Ref Nbr.
09/06/2013	RE Offense 2: Plea of not guilty	
09/06/2013	RE Offense 3: Plea of not guilty	
09/06/2013	RE Offense 4: Plea of not guilty	
09/06/2013	RE Offense 5: Plea of not guilty	
09/06/2013	RE Offense 6: Plea of not guilty	
09/06/2013	Defendant held without bail, without prejudice, by agreement (Frances McIntyre, Justice)	
09/06/2013	Bail: mittimus issued	7
09/06/2013	Assigned to track "C". Counsel to file proposed scheduling order. (McIntyre, J.)	
09/06/2013	Tracking deadlines Active since return date	
09/06/2013	Defendant's MOTION to Preclude Unnecessary, Prejudicial and Inflammatory Statements, Either Orally or in Writing, During the Defendant's Arraignment	8
09/06/2013	(P#8) No action required per the agreement of prosecution and defense. (Frances McIntyre, Justice).	
09/06/2013	Defendant's MOTION to Preserve Evidence	9
09/06/2013	(P#9) Allowed as to paragraph one. Denied as to paragraph two without prejudice. (Frances McIntyre, Justice). Copies mailed 9/10/2013	
09/06/2013	Defendant's MOTION for Order Prohibiting Prejudicial, Extrajudicial Statements of Counsel and Their Agents with Proposed Order	10
09/06/2013	Memorandum of Law in Support of Defendant's Motion for Order Prohibiting Prejudicial, Extrajudicial Statements of Counsel and Their Agents	11
09/06/2013	Affidavit of James L. Sultan	12
09/17/2013	Order for Special Assignment: It is hereby ordered that the above captioned case is hereby specially assigned to the Honorable E. Susan Garsh, Associate Justice of the Superior Court, for all purposes. (Barbara J. Rouse, Chief Justice of the Superior Court) (Copies to counsel)	13
09/19/2013	(P#10) The Commonwealth is ordered to file a response by Sept. 30, 2013. (E. Susan Garsh, Justice).	
10/01/2013	Commonwealth's Memorandum in Opposition to the Defendant's Motion Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents	14
10/09/2013	Commonwealth's Motion for Recusal (Filed in the case of Commonwealth vs. Eric Durand - BRCR2003-1292)	15
10/09/2013	Memorandum in Support of Commonwealth's Motion for Recusal	16
10/09/2013	MOTION (P#10) Denied for the reasons stated on the record. (Garsh, J.) jtv	
10/09/2013	MOTION (P#9) After review and hearing, the Commonwealth is ordered to disclose to the defendant whether any "automatic discovery" has been destroyed, lost or altered when and if it becomes aware of such, and is further ordered to request of the law enforcement officials or others from whom it is seeking said materials whether any of the automatic discovery has been destroyed, lost or altered and, if so, to provide the details. (Garsh, J.)	
10/09/2013	Commonwealth's Motion for Recusal; Affidavit of Counsel; Memorandum in Support	17
10/15/2013		18

Docket Date	Docket Text	File Ref Nbr.
	MEMORANDUM & ORDER: For the reasons state above, it is ORDERED that the defendant's Motion for Order Prohibiting Prejudicial, Extrajudicial Statements of Counsel and their Agents be and hereby is DENIED without prejudice. 10/15/2013, (E. Susan Garsh, Justice) (copies faxed and e-mailed to counsel)	
10/17/2013	Defendant's Memorandum of Law in Opposition to Commonwealth's Motion for Recusal	19
10/21/2013	Copy of Commonwealth's Motion for Recusal with endorsements thereon filed in BRCR2003-01292, Commonwealth v. Eric Durand	19.1
10/21/2013	Disc of the George Duarte Transcript Dated June 17, 2010	19.2
10/24/2013	MEMORANDUM of Decision & ORDER on Commonwealth's Motion for Recusal.....For the reasons stated above, it is hereby ORDERED that the Commonwealth's Motion for recusal be and hereby is DENIED. (E. Susan Garsh, Justice) copies mailed 10/24/2013	20
11/15/2013	Defendant's Renewed MOTION for Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents and Request for an Evidentiary Hearing: Memorandum of Law in Support; Affidavit of Michael K. Fee	21
11/20/2013	(P#21) Opposition due from the Commonwealth by 12/3/13. (E. Susan Garsh, Justice/maf). counsel notified 11/20/2013	
11/29/2013	Commonwealth's Request for Continuance; Affidavit of William M. McCauley	22
12/02/2013	(P#22) Allowed, conditional upon counsel agreeing upon any of the following dates: December 23, 2013 (PM), December 24, 2013 (AM or PM), December 26, 2013 (PM), December 27, 2013 (PM), December 30, 2013 (PM), December 31, 2013 (AM or PM), or January 2, 2014 (PM). If none of these dates are mutually agreeable the hearing will go forward as scheduled on December 13, 2013 (E. Susan Garsh, Justice). Copies mailed 12/2/2013	
12/03/2013	Commonwealth's Opposition to Defendant's Motion for Order Prohibiting Extrajudicial Statements of Counsel and Their Agents	23
01/08/2014	Defendant's Revised Proposed Order Regarding Prejudicial Extrajudicial Statements	24
01/15/2014	Proposed Order Regarding Pre-Trial Publicity	25
01/17/2014	Defendant's Response and Opposition to the Commonwealth's Modification of Proposed Order	27
01/23/2014	Commonwealth's Response to Defendant's Opposition to Commonwealth's Proposed Order Regarding Pre-Trial Publicity	28
01/30/2014	Commonwealth's MOTION for Production of Bristol County Sheriff's Department Records Pursuant to Mass.R.Crim.P. 17(a)(2) and M.G.L. c. 233, s. 79J; Affidavit in Support	29
01/31/2014	Defendant's Motion for Bill of Particulars	30
01/31/2014	Defendant's MOTION for Discovery	31
01/31/2014	Defendant's MOTION to Compel Commonwealth to State Whether It has Fully Produced Agreed-Upon Discovery to Date and If Not, When It Intends to Complete Said Production	32
02/03/2014	Order for transcipt of portion of hearing held on 12/23/13.	33
02/03/2014	Deft files Opposition to Commonwealth's motion for production of Bristol County Sheriff's Department records.	34
02/07/2014	Pl # 29, Commonwealth's MOTION for Production of Bristol County Sheriff's Department Records Pursuant to Mass.R.Crim.P. 17(a)(2) and M.G.L. c. 233, s. 79J, endorsed as follows: Denied without prejudice. Ruling on the Record. Commonwealth ordered to produce Sheriff's	

Docket Date	Docket Text	File Ref Nbr.
	recordings in their possession by end of the day Monday 2/10/14. (Garsh, J.) MAF	
02/07/2014	PI # 32, Defendant's MOTION to Compel Commonwealth to State Whether It has Fully Produced Agreed-Upon Discovery to Date and If Not, When It Intends to Complete Said Production, endorsed as follows: No action requested at this time. (Garsh, J.) MAF	
02/07/2014	PI # 31, Defendant's MOTION for Discovery endorsed as follows: Allowed in part, denied in part. Rulings on the Record. (Garsh, J.) MAF	
02/07/2014	PI # 30, Defendant's Motion for Bill of Particulars endorsed as follows: Denied as to Count One; allowed without objection as to counts two through six. Complete ruling on the record. (Garsh, J.) MAF	
02/07/2014	Order for Transcript of the Court's rulings on the discovery motions heard on 2/7/14.	35
02/11/2014	Ruling on (PI # 31) Defendant's Motion for Discovery (Garsh, J.) MAF	36
02/11/2014	Ruling on (PI # 29) Commonwealth's Motion for Production of Bristol County Sheriff's Department Records (Garsh, J.) MAF	37
02/11/2014	Ruling on (PI # 30) Defendant's Motion for Bill of Particulars (Garsh, J.) MAF	38
02/13/2014	Memorandum of Decision and Order on Defendant's Renewed Motion for Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents and Request for an Evidentiary Hearing	39
02/13/2014	PI # 21, Defendant's Renewed Motion for Order Prohibiting Prejudicial Extrajudicial Statements of Counsel and Their Agents and Request for an Evidentiary Hearing endorsed as follows: Allowed in part, denied in part; see separate Memorandum and Order dated 2/10/14 (PI #39). (Garsh, J.) MAF	
03/14/2014	Request for Temporary Stay	40
03/17/2014	Pleading # 40, Request for Temporary Stay, endorsed as follows: 3/17/14 No action will be taken on the Request for Temporary Stay until the Commonwealth's petition, which its motion states "has been served upon this court," and which is the basis of the request for a stay, is in fact filed with this court, and until the defendant has an opportunity to respond. Defendant is ordered to respond by March 18, 2014. (Garsh, J.) MAF	
03/17/2014	Defendant's Motion for Further Compliance with Court Order Allowing Defendant's Motion for Bill of Particulars with Respect to Counts 2 and 4	41
03/18/2014	Defendant Aaron Hernandez's Opposition to Commonwealth's Request for a Temporary Stay	42
03/18/2014	Memorandum of Decision and Order on Commonwealth's Request for Temporary Stay	43
03/18/2014	MOTION (P#40) Request for Temporary Stay, Denied; see memorandum dated 3/18/14. (Garsh, J.) MAF	
03/25/2014	PI # 41, Defendant's Motion for Further Compliance with Court Order Allowing Defendant's Motion for Bill of Particulars with Respect to Counts 2 and 4, endorsed as follows: "The Commonwealth shall file a response by April 3, 2014. (Garsh, J.) MAF"	
04/02/2014	Notice of Attorney Change of Address and Change of Law Firm	44
04/03/2014	Request for Leave to Withdraw Appearance	45
04/03/2014	Commonwealth's Response to Defendant's Motion for Further Compliance With Court Order Allowing Defendant's Motion for Bill of Particulars With Respect to Counts 2 and 4	46

Docket Date	Docket Text	File Ref Nbr.
04/09/2014	NOTICE OF DOCKET ENTRY: MEMORANDUM OF DECISION..."The Commonwealth has failed to establish that the extraordinary relief available under G. > c. 211, s3, see Commonwealth v. Yelle, 390 Mass. 678, 687 (1984), is appropriate. Accordingly, an order shall enter denying the Commonwealth's petition pursuant to G. L. C. 211, s. 3." (Duffly, J.)	47
04/09/2014	NOTICE OF DOCKET ENTRY: JUDGMENT... "In accordance with the memorandum of decision of this date, it is ORDERED that the Commonwealth's petition pursuant to G. L. c. 211, s.3, and all other motions for relief herein, shall be, and hereby are, DENIED." (Duffly, J.)	48
04/10/2014	MOTION (P#45) Allowed (E. Susan Garsh, Justice).	
04/14/2014	NOTICE OF DOCKET ENTRY: CORRECTED MEMORANDUM OF DECISION..."The Commonwealth has failed to establish that the extraordinary relief available under G. L c. 211, s 3, see Commonwealth v. Yelle, 390 Mass. 678, 687 (1984), is appropriate. Accordingly, an order shall enter denying the Commonwealth's petition pursuant to G. L. c. 211, s. 3." (Duffly, J.)	49
04/14/2014	NOTICE OF DOCKET ENTRY: CORRECTED JUDGMENT... "In accordance with the memorandum of decision of this date, it is ORDERED that the Commonwealth's petition pursuant to G. L. c. 211, s.3, and all other motions for relief herein, shall be, and hereby are, DENIED." (Duffly, J.)	50
04/17/2014	MOTION (P#41) The Commonwealth's response includes the additional information sought by this motion, namely the locations of the alleged possession of a firearm (Count 2) and the specific large capacity weapon/feeding device (Count 4). Accordingly, motion for order directing such supplementation is denied. (Garsh, J.) MAF (E. Susan Garsh, Justice). Copies mailed 4/17/2014	
04/22/2014	Defendant's Motion for Two-Week Extension of Time for Filing Pretrial Motions (Assented-To)	51
04/22/2014	MOTION (P#51) Allowed (E. Susan Garsh, Justice).	
05/15/2014	Defenandant's Motion to Dismiss Indictments 983-01 and 983-02	52
05/15/2014	Affidavit of James L. Sultan and Exhibits 1-3 in Support of Defendant's Motion to Dismiss Indictments 983-01 and 02 FILED UNDER SEAL (filed and maintained under seal pursuant to G.L.c.268, sec. 13D(e))	53
05/15/2014	Memorandum of Law in Support of Defendant's Motion to Dismiss Indictments 983-01 and 02 FILED UNDER SEAL (filed and maintained under seal pursuant to G.L.c.268, sec. 13D(e))	54
05/15/2014	Defendant's Motion to Compel Production of Previously-Ordered or Previously-Agreed-Upon Discovery	55
05/15/2014	Defendant's Second Motion for Discovery	56
05/15/2014	Defendant's Motion to Suppress Fruits of June 18, 2013 Search	57
05/15/2014	Memorandum of Law in Support of Defendant's Motion to Suppress Fruits of June 18, 2013 Search	58
05/15/2014	Affidavit of James L. Sultan in Support of Defendant's Motion to Suppress Fruits of June 18, 2013 Search	59
05/23/2014	Commonwealth's MOTION to Enlarge the Time for the Filing of Responsive Pleadings; Affidavit of R.L. Michel, Jr. in Support of Motion to Enlarge the Time for the Filing of Responsive Pleadings	60
05/27/2014	MOTION (P#60), Motion to Enlarge the Time for the Filing of Responsive Pleadings, endorsed as follows: "5/27/14 Motion seeks not only to enlarge time for filing response, but also to change hearing date. Insofar as it seeks to postpone hearing, it is denied. The Commonwealth can be expected to be familiar with the application for	

Docket Date	Docket Text	File Ref Nbr.
	search warrant, grand jury testimony and materials submitted to the grand jury. To the extent motion seeks to enlarge time for filing a response, it is denied. Responses to defendant's motions are ordered to be filed by noon on June 13, 2014, with service upon defense by email or fax by same date and time. Moreover, parties will have oppurtunity to file post-hearing memoranda should they so wish. E. Susan Garsh, Justice"	
06/10/2014	Defendant's Motion to Inspect Original Hard Drive Seized From Home Video Surveillance System:	61
06/12/2014	Opposition to paper #52.0 Defendant's Motion to Dismiss Indictments 2013-00983-01/02 filed by Commonwealth (Sealed pursuant to M.G.L. c268 s13D)	62
06/12/2014	Opposition to paper #57.0 Defendant's Motion to Suppress Fruits of June 18, 2013 Search filed by Commonwealth	63
06/13/2014	Event Result: The following event: Status Review scheduled for 06/13/2014 12:00 PM has been resulted as follows: Result: Held as Scheduled Appeared:	
06/13/2014	Defendant's Motion for Discovery Respecting Interviews of Grand Jury Witnesses Conducted Just Prior to Their Grand Jury Appearance:	64
06/13/2014	Affidavit of James L. Sultan Applies To: Sultan, Esq., James L (Attorney) on behalf of Hernandez, Aaron J (Defendant)	64.1
06/16/2014	Commonwealth's Response to Defendant's Motion to Inspect Original Hard Drive Seized from Home Fideo Surveillance System:	65
06/16/2014	Event Result: The following event: Non-Evidentiary Hearing to Dismiss scheduled for 06/16/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
06/16/2014	Event Result: The following event: Non-Evidentiary Hearing on Suppression scheduled for 06/16/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
06/16/2014	Event Result: The following event: Pre-Trial Hearing scheduled for 06/16/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
06/16/2014	Endorsement on Motion to Compel Production of Previously -Ordered or Previously-Agreed-Upon Discovery, (#55.0): Allowed without objection; production by Commonwealth no later than June 30, 2014. (Garsh, J./MAF) (Ruling on the record)	
06/16/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	

Docket Date	Docket Text	File Ref Nbr.
06/16/2014	Endorsement on Motion for Discovery, (#56.0): Allowed without objection, except for #3; production no later than June 30, 2014. Also #3 not allowed as to Commonwealth work product, allowed as to summaries created by police. (Garsh, J./MAF) (Ruling on the Record)	
06/16/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
06/16/2014	Endorsement on Motion to Inspect Original Hard Drive Seized From Home Vieo Surveillance System, (#61.0): Denied without prejudice. (Garsh, J./MAF)	
06/16/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
06/16/2014	Endorsement on Motion for Discovery Respecting Interviews of Grand Jury Witnesses Conducted Just Prior to Their Grand Jury Appearance, (#64.0): Allowed without objection, to extent exists; produce by June 30, 2014 or state that none exist. (Garsh, J./MAF) (Ruling on the record)	
06/16/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
06/17/2014	Defendant's Motion for Issuance of Pretrial Subpoena Duces Tecum to the New England Patriots:	66
06/17/2014	Affidavit filed by Defendant Aaron J Hernandez in support of Motion for Issuance of Pretrial Subpoena Duces Tecum to the New England Patriots	67

Docket Date	Docket Text	File Ref Nbr.
06/18/2014	Event Result: The following event: Evidentiary Hearing scheduled for 06/18/2014 09:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
06/20/2014	Defendant's Motion for Transfer from the Bristol County Jail and House of Correction to Another County Jail Located Closer to Boston:	68
06/20/2014	Memorandum filed in support of Defendant's Motion for Transfer from the Bristol County Jail and House of Correction to Another County Jail Located Closer to Boston Applies To: Hernandez, Aaron J (Defendant)	68.1
06/20/2014	Affidavit of Michael K. Fee in Support of Defendant's Motion for Transfer from the Bristol County Jail and House of Correction to Another County Jail Located Closer to Boston Applies To: Hernandez, Aaron J (Defendant)	68.2
06/20/2014	Affidavit of James L. Sultan in Support of Defendant's Motion for Transfer from the Bristol County Jail and House of Correction to Another County Jail Located Closer to Boston Applies To: Hernandez, Aaron J (Defendant)	68.3
06/23/2014	Defendant's Motion for Summonses of Raw Video Footage From June 18, 2013 at 22 Ronald C. Meyer Drive, North Attleboro, Massachusetts Pursuant to Mass.R.Crim.Proc. 17(A)(2): and Incorporated Memorandum of Law	69
06/23/2014	General correspondence regarding Defendant's Submission of Additional Evidence Respecting Motion to Suppress	71
06/23/2014	Affidavit of Charles A. Rankin In Support of Defendant's Motion and Incorporated Memorandumn of Law for Summonses of Raw Video Footage From June 18, 2013 at 22 Ronald C. Meyer Drive, North Attleboro, Massachusetts Pursuant to Mass.R.Crim.Proc. 17(A)(2) Attorney: Rankin, Esq., Charles Wesley Applies To: Rankin, Esq., Charles Wesley (Attorney) on behalf of Hernandez, Aaron J (Defendant)	70
06/25/2014	Memorandum filed in support of His Motion to Suppress Evidence from the June 18, 2013 Search Supplemental Memorandum Applies To: Hernandez, Aaron J (Defendant)	73
06/30/2014	Opposition to paper #57 Motion to suppress fruits of June 18, 2013 search filed by Commonwealth (Supplemental)	74
07/03/2014	Commonwealth's Response to Defendant's Motion to Change Location of Pre-Trial Custody	75
07/07/2014	Event Result: The following event: Hearing on Compliance scheduled for 07/07/2014 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared:	
07/07/2014	Endorsement on PI # 68, Defendant's Motion for Transfer from the Bristol County Jail and House of Correction to Another County Jail Located Closer to Boston: After review, and there being no opposition from the Commonwealth, in order to facilitate the defendant's 6th Amendment right to consult with	

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	counsel and to assist in the preparation of his defense, the Court orders that the defendant be removed by the Commissioner of Correction to a jail in another county that is closer to defense counsel, such as Suffolk County. The Court does not reach any of the other issues raised by the defenant as additional justification for his transfer. (Garsh, J.)	
07/07/2014	Memorandum filed in support of Defendant's Response to Commonwealth's Supplemental Opposition to Defendant's Motion to Suppress Fruits of June 18, 2013 Search Re Authority to Seize Cell Phone 203-606-8969 Applies To: Hernandez, Aaron J (Defendant); Sultan, Esq., James L (Attorney) on behalf of Hernandez, Aaron J (Defendant); Rankin, Esq., Charles Wesley (Attorney) on behalf of Hernandez, Aaron J (Defendant); Fee, Esq., Michael Kelley (Attorney) on behalf of Hernandez, Aaron J (Defendant)	76
07/07/2014	Endorsement on P# 69: Allowed given the obvious materiality and relevancy of the records to the defense motion to suppress. Records to be produced in advance of hearing on motion to suppress. Return date is 7/21/14. Garsh, J.	
07/08/2014	Notice and Summons (Dwyer) issued to Keeper of Records WBZ-TV of to produce privileged records by 07/21/2014 to the Clerk of the Superior Court	77
07/08/2014	Notice and Summons (Dwyer) issued to Keeper of Records WCVB-TV of to produce privileged records by 07/21/2014 to the Clerk of the Superior Court.	78
07/08/2014	Notice and Summons (Dwyer) issued to Keeper of Records WHDH-TV of to produce privileged records by 07/21/2014 to the Clerk of the Superior Court.	79
07/08/2014	Notice and Summons (Dwyer) issued to Keeper of Records WFXT-TV of to produce privileged records by 07/21/2014 to the Clerk of the Superior Court.	80
07/08/2014	Notice and Summons (Dwyer) issued to Keeper of Records NECN-TV of to produce privileged records by 07/21/2014 to the Clerk of the Superior Court.	81
07/08/2014	Opposition to paper #66 Defendant's Motion for Issuance of Pretrial Subpoena Duces Tecum to the New England Patriots filed by New England Patriots	82
07/09/2014	Habeas Corpus for defendant issued to Bristol House of Correction returnable for 07/09/2014 02:00 PM Motion Hearing.	83
07/09/2014	Matter taken under advisement The following event: Motion Hearing scheduled for 07/09/2014 02:00 PM has been resulted as follows: Result: Held - Under advisement Appeared: Attorney Phelan, Esq., Andrew C. Defendant Hernandez, Aaron J Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley	
07/09/2014	Affidavit of Michael K. Fee, Supplemental and in Part Ex Parte, in support of Defendant's Motion for Issuance of PreTrial Subpoena Duces Tecum to the New England Patriots Applies To: Fee, Esq., Michael Kelley (Attorney) on behalf of Hernandez, Aaron J (Defendant)	84
07/09/2014	General correspondence regarding Defendant Aaron Hernandez's Memorandum in Reply to the New England Patriots' Opposition to His Motion for the Issuance of a Pre-Trial Subpoena Duces Tecum	85
07/09/2014	General correspondence regarding Notice of Appearance of Andrew Phelan for the New England Patriots	86
07/10/2014	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 07/14/2014 04:00 PM Status Review.	
07/11/2014	Event Result: The following event: Hearing on Dwyer Motion scheduled for 07/22/2014 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Transfered to another session Appeared:	
07/11/2014	General correspondence regarding Commonwealth's Certificate of Compliance	87
07/14/2014		88

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	MEMORANDUM & ORDER: on Defendant's Motion to Suppress Fruits of June 18, 2013 Search (Digital Video Records, Hard Drive, and Cell Phone with Specified Number)	
07/14/2014	Event Result: The following event: Status Review scheduled for 07/14/2014 04:00 PM has been resulted as follows: Result: Held as Scheduled Appeared:	
07/16/2014	Event Result: The following event: Conference to Review Status scheduled for 07/22/2014 12:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date Appeared:	
07/16/2014	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 07/22/2014 09:00 AM Conference to Review Status.	89
07/16/2014	General correspondence regarding Defendant's Response to Court's Inquiry Respecting the Scheduling of the Trial	90
07/16/2014	General correspondence regarding Defendant's Further Response to Commonwealth's Supplemental Opposition to Defendant's Motion to Suppress Fruits of June 18, 2013 Search Re: Authority to Seize Cell Phone XXX-XXX-8969	91
07/21/2014	Other - records received from WHDH-TV	92
07/21/2014	Event Result: The following event: Status Review scheduled for 07/21/2014 04:00 PM has been resulted as follows: Result: Held as Scheduled Appeared:	
07/22/2014	Defendant's Motion to Enforce Court Rule Prohibiting Electronic Recording and Transmission of Conferences Among Counsel and Conferences Between Counsel and Client; Affidavit of James L. Sultan	93
07/22/2014	Event Result: The following event: Hearing on Dwyer Motion scheduled for 07/22/2014 02:00 PM has been resulted as follows: Result: Not Held Reason: Transfered to another session Appeared:	
07/22/2014	Event Result: The following event: Conference to Review Status scheduled for 07/22/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
07/22/2014	Endorsement on Motion to Defendant's motion to enforce court rule prohibiting electronic recording and transmission of conferences among counsel and conferences between counsel and client, (#93): No Action Taken After hearing, no action taken at this time at the Defendant's request Applies To: Sultan, Esq., James L (Attorney) on behalf of Hernandez, Aaron J (Defendant); Rankin, Esq., Charles Wesley (Attorney) on behalf of Hernandez, Aaron J (Defendant); Bomberg, Esq., Patrick Otto (Attorney) on behalf of Commonwealth (Prosecutor); Michel, Jr., Esq., Roger Lee (Attorney) on behalf of Commonwealth (Prosecutor); McCauley, Esq., William M (Attorney) on behalf of Commonwealth (Prosecutor); Fee, Esq., Michael Kelley (Attorney) on behalf of Hernandez, Aaron J (Defendant)	
07/22/2014	Endorsement on Motion for Issuance of pretrial subpoena Duces Tecum to the New England Patriots, (#66): No Action Taken withdrawn by counsel	
07/22/2014	Endorsement on Request to Defendant's response to Court's inquiry respecting the scheduling of the trial, (#90): Other action taken	

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	After review and hearing, the trial date is scheduled for January 9, 2015. Other dates are as specified herein and attached future hearing dates	
07/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
07/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
07/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
07/22/2014	General correspondence regarding Records from New England Cable News (NBCUniversal)	94
07/22/2014	General correspondence regarding Records from WBZ-TV	95
07/24/2014	MEMORANDUM & ORDER: on Defendant's Motion to Dismis Indictments 983-01 and 983-02: It is hereby ORDERED that the Defendant's Motion to Dismiss Indictments 983-01 and 983-02 be DENIED.	96
07/24/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
07/25/2014	Commonwealth's Motion for an Order Authorizing DNA Testing on Samples where Biogical Material is limited in Quantity	97
07/28/2014	Other - records received from WFXT-TV	98
07/30/2014	General correspondence regarding Records from WCVB-TV	99
07/30/2014	Opposition to paper #97 Commonwealth's Motion for an Order Authorizing DNA Testing on Samples where Biological Material is Limited in Quantity filed by Aaron J Hernandez	100
07/30/2014	Endorsement on Motion for an Order Authorizing DNA Testing on Samples where Biological Material is Limited in Quantity, (#97): Allowed after review. The affidavit of the Technical Leader of the State Police DNA Unit, submitted with the Commonwealth's motion, represents that the samples at issue "were identified as being of a limited	

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	quantity, and will require the entire sample to be consumed during DNA analysis in order to maximize the potential for obtaining DNA results." Accordingly, the defendant is ordered to notify the Commonwealth within seven days of the date of this Order whether he intends to have an expert present during testing, in which case the testing should be scheduled on a date that would accommodate the expert's schedule. It is further ordered that the exhaustive testing may proceed without the presence of the defendant's expert if the defendant advises that he does not intend to have an expert present. To the extent that it is determined by the DNA Unit that the entire sample for an item is not, in fact, required to be consumed during DNA analysis in order to maximize the potential for obtaining DNA results, the remaining sample should be preserved and the defendant notified. The Commonwealth is ordered to arrange for the DNA testing to be performed as expeditiously as possible, bearing in mind the deadlines set for disclosure of expert opinions.	
07/30/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
08/04/2014	Event Result: The following event: Motion Hearing scheduled for 10/20/2014 09:00 AM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date Appeared:	
08/06/2014	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 08/11/2014 09:00 AM Motion Hearing.	
08/11/2014	Defendant's Motion for Defense Ballistic Expert to Inspect Ballistics Evidence at his Laboratory	101
08/11/2014	Defendant's Motion to File Defendant's Motion for Production of GSR Testing Data Sheets	102
08/11/2014	Defendant's Motion for Production of GSR Testing Data Sheets	103
08/11/2014	General correspondence regarding Defendant's Supplemental Submission in Support of Motion to Suppress	104
08/11/2014	Event Result: The following event: Motion Hearing scheduled for 08/11/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
08/11/2014	Endorsement on Motion for Defense Ballistics Expert to Inspect Ballistics Evidence at His Laboratory, (#101.0): ALLOWED	
08/11/2014	Endorsement on Motion for Leave to File Defendant's Motion for Production of GSR Testing Datat Sheets, (#102.0): ALLOWED	
08/11/2014	Endorsement on Motion for Production of GSR Testing Data Sheets, (#103.0): ALLOWED without objection.	
08/11/2014	List of exhibits	105
08/11/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
08/11/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq.	

Docket Date	Docket Text	File Ref Nbr.
	Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
08/11/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
08/11/2014	ORDERED: August 11, 2014 After review and hearing, and there being no opposition, it is Ordered that Greg Danas, the ballistics expert for the defendant, may review the ballistic evidence in the above-captioned case, under the following conditions: 1. On a mutually-convenient date, within thirty days of this Order , a State Police Trooper shall bring the ballistic evidence to Mr. Danas at his laboratory, located at 164 Andover Street in Lowell, MA, remain on the premises while Mr. Danas conducts his examination, and take the evidence back once the examination is completed; 2. Mr. Danas is the only individual authorized to maintain possession and custody of the ballistic evidence and perform any necessary examination; 3. The ballistic evidence will not be altered in any way and any testing will be non-destructive; 4. Mr. Danas will not use the ammunition in this case for test firing of the weapon, nor will Mr. Danas disassemble the firearm in any manner without prior written notice to and approval of the Commonwealth, the Defense Counsel and the Court; 5. If disassembly of the firearm evidence is requested, Mr. Danas will articulate to all counsel of record the specifics about any anticipated manipulation of evidence and why this form of disassembly is necessary; and 6. If any of the ballistic evidence is lost, damaged, or altered during the pendency of Mr. Danas' custody of the items, the defense will take full responsibility. E. Susan Garsh, Justice of the Superior Court	106
08/13/2014	Defendant's Motion for Leave to Submit Two Police Reports as Additional Evidence in Support of Motion to Suppress	107
08/13/2014	General correspondence regarding : Identification of Home Video Surveillance Files Depicting Trooper Cherven	108
08/13/2014	Endorsement on Motion for Leave to Submit Two Police Reports as Additional Evidence in Support of Motion to Suppress, (#107.0): ALLOWED	

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08/14/2014	Opposition to paper #91.0 Defendant's Motion to Suppress Fruits of June 18, 2013 Search filed by Commonwealth Second Supplemental Opposition	109
08/15/2014	General correspondence regarding : Records received from Comcast , Inc.	110
08/19/2014	ORDERED: August 19, 2014 In connection with the defendant's motion to suppress, which the Court has taken under advisement, the Court orders the Commonwealth to produce by August 20, 2013: 1. a copy of the affidavit, application, and search warrant for the cellular telephone number 203-606-8969, which warrant was obtained by Trooper Glossi on June 18, 2013, as described in his Report of Investigation that was submitted into evidence by the defendant, and 2. copies of the "further warrants for all data extractions from the seized devices" referenced in the Commonwealth's Supplemental Opposition (other than the warrants for the Apple devices previously submitted by the Commonwealth). E. Susan Garsh, Justice of the Superior Court	111
08/26/2014	MEMORANDUM & ORDER: . . . For the foregoing reasons, it is hereby ORDERED that the Defendant's Motion to Suppress Fruits of June 18, 2013 Search be ALLOWED with respect to the Apple iPhone 5 cell phone, the Blackberry Bold cell phone, the Apple iPad 16 gb tablet and the two Apple iPad mini tablets seized from 22 Ronald C. Meyer Drive in North Attleboro on June 18, 2013.	112
08/26/2014	BusinessCD's and Reports records received from Norfolk House of Correction	113
09/02/2014	Business records received from Plymouth Sheriff's Department.	114
09/03/2014	Business records received from Bristol Sheriff's Department	113.1
09/08/2014	Defendant 's Motion to suppress Cellular Telephone XXX-XXX-8969 and Fruits Thereof; Memorandum of Law in Support of Motion to Suppress; Affidavit of Charles W. Rankin; Affidavit of Michael K. Fee; Affidavit of Robert G. Jones	115
09/08/2014	Defendant 's Motion for Leave to Submit Further Substantive Motions By September 12, 2014	116
09/08/2014	Endorsement on Motion for Leave to Submit Further Substantive Motions by September 12, 2014, (#116.0): ALLOWED Allowed. Commonwealth to file opposition by 9/19/14. (Garsh, J.)	
09/15/2014	Defendant 's Motion to suppress Evidence Seized From His Residence on June 22, 2013 That Was Beyond the Scope of the Warrant;	117
09/15/2014	Defendant 's Motion to suppress Fruits of Search of 599 Old West Central Street, Apartment A12 On June 26, 2013 (With Incorporated Memorandum of Law); Second Affidavit of C.W. Rankin	118
09/15/2014	Defendant 's Motion to suppress Evidence Seized During Search of Hummer on June 26, 2013 Due to Lack of Probable Cause; Memorandum of Law in Support	119
09/15/2014	Defendant 's Motion to suppress Fruits of Unlawful Police Interrogation of Defendant During June 18, 2013 Search of His Home at 22 Ronald C. Meyer Drive, North Attleboro, Including His Cell Phone Number 203-606-8969; Memorandum of Law in Support; Affidavit of A. Hernandez; Affidavit of H. Knight	120
09/16/2014	Defendant 's Motion to suppress Evidence Seized From 599 Old West Central Street, Apartment A12, Franklin, Massachusetts on June 26, 2013 and All Derivative Fruits of That Search	121
09/23/2014	Opposition to paper #120.0 Defendant's Motion to Suppress Evidence of Cell Phone 203-606-8969 filed by	122
09/23/2014	ORDER: Scheduling	123
09/24/2014	Commonwealth 's Response to Defendant's Motion to Suppress Evidence Seized During Search of "Hummer" Automobile on June 26, 2013 Due to Lack of Probable Cause	124
09/24/2014	Commonwealth 's Motion for Ex Parte Order of Impoundment and for Hearing to Impound Pending Trial	125
09/24/2014	Commonwealth 's Response to Defendant's Motion to Suppress Evidence Seized from 599 Old West Central Street, Apartment A12, Franklin, Massachusetts on June 26, 2013 and All Derivitive Fruits of That Search	126

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09/24/2014	Commonwealth 's Response to Defendant's Motion to Suppress Fruits of Unlawful Police Interrogation During June 18, 2013 Search of His Home at 22 Ronald C. Meyer Drive, North Attleboro, MA Including His Cell Phone Bearing 203-606-8969	127
09/24/2014	Commonwealth 's Response to Defendant's Motion to Suppress Evidence Seized from His Residence on June 22, 2013 that was Beyond the Scope of the Warrant	128
09/26/2014	Habeas Corpus for defendant Issued to Suffolk County Jail returnable for 09/30/2014 09:00 AM Motion Hearing.	129
09/29/2014	Defendant Aaron J Hernandez's Memorandum (Procedural) Respecting Upcoming Hearing on Motions to Suppress	130
09/29/2014	Commonwealth 's Request for Continuance of Filing Date for Intended Expert Opinion Evidence; Affidavit	131
09/29/2014	Commonwealth 's Response to Defendant's Procedural Memorandum Respecting Upcoming Hearing on Motions to Suppress Evidence of Cell Phone 203-606-8969	132
09/30/2014	Habeas Corpus for defendant Issued to Suffolk County Jail returnable for 10/01/2014 09:00 AM Motion Hearing.	133
09/30/2014	Event Result: The following event: Motion Hearing scheduled for 09/30/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
09/30/2014	Defendant 's Motion for a Change of Venue; Memorandum of Law in Support of Defendant's Motion for a Change a Venue; Affidavit of M.K. Fee; Declaration of J. Della Volpe	134
10/01/2014	Event Result: The following event: Motion Hearing scheduled for 10/01/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
10/01/2014	Commonwealth 's Motion for Discovery Regarding Defendant's Motion for a Change of Venue (First)	135
10/01/2014	Habeas Corpus for defendant Issued to Suffolk County Jail returnable for 10/02/2014 09:00 AM Motion Hearing.	135.1
10/01/2014	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 10/03/2014 09:00 AM Motion Hearing. CANCELLED	136
10/01/2014	List of exhibits Hearing on Motion to Suppress (# 115)	137
10/02/2014	Event Result: The following event: Motion Hearing scheduled for 10/02/2014 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
10/02/2014	List of exhibits Hearing on Motion to Suppress (# 120)	138
10/02/2014	List of exhibits Hearing on Motion to Suppress (# 117)	139
10/02/2014	ORDER: October 2, 2014 Memorandum of Decision and Order on Defendant's Motion to Suppress Evidence Seized From 599 Old West Central Street, Apartment A12, Franklin, Massachusetts on June 26, 2013 and All Derivative Fruits of That Search (Garsh, J.)	140
10/02/2014	Endorsement on Motion to Suppress Evidence Seized From 599 Old West Central Street, Apartment A12, Franklin, Massachusetts on June 26, 2013 and All Derivative Fruits of That Search, (#121.0): ALLOWED See Memorandum dated 10/2/14 and docketed as pleading # 140. (Garsh, J.)	

Docket Date	Docket Text	File Ref Nbr.
10/02/2014	Endorsement on Motion to Suppress Evidence Seized During Search of Hummer on June 26, 2013 Due to Lack of Probable Cause, (#119.0): ALLOWED See Memorandum dated 10/2/14 and docketed as pleading # 140. (Garsh, J.)	
10/02/2014	Endorsement on Motion to Suppress Fruits of Search of 599 Old West Central Street, Apartment A12 on June 26, 2013 (with Incorporated Memorandum of Law), (#118.0): No Action Taken In light of ruling on pleading # 121. See Memorandum dated 10/2/14 and docketed as pleading # 140. (Garsh, J.)	
10/02/2014	Business records received from Sprint	141
10/06/2014	Opposition to paper #135.0 (First) Motion for Discovery Regarding Defendant's Motion for a Change of Venue filed by Aaron J Hernandez	142
10/07/2014	Endorsement on Motion for Discovery Regarding Defendant's Motion for a Change of Venue, (#135.0): DENIED After review, the Commonwealth's First Motion for Discovery Regarding Defendant's Motion for Change of Venue is denied. If, however, the defendant does not voluntarily provide the requested documents to the Commonwealth in sufficient time for the Commonwealth to prepare its opposition to the defendant's motion, the defendant will be precluded from introducing non-produced documents at the hearing and from introducing testimony concerning the contents of any such documents, such as the survey questionnaires, demographic data and so forth. (Garsh, J.)	
10/08/2014	Event Result: The following event: Evidentiary Hearing on Supression scheduled for 10/08/2014 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared:	
10/08/2014	Defendant 's Motion for Disclosure of Trial Subpoenas Served by the Commonwealth to Date and for Further Relief	143
10/08/2014	Defendant 's Motion for Production of All Video and/or Audio Recordings of Him and/or His Counsel at the North Attleboro Police Station on June 17-18, 2013	144
10/08/2014	Endorsement on Motion for Disclosure of Trial Subpoenas Served by the Commonwealth to Date and for Further Relief, (#143.0): ALLOWED Allowed as to production of trial subpoenas. This is a mutual discovery obligation.To the extent records are inadvertently produced to the District Attorney's Office, they should be presented to the Clerk's Office, and if inadvertently opened, copies should be provided to defense counsel. No action taken on request for order regarding wording of the subpoenas given the representation that subpoenas all require production to the Clerk's Office and will continue to so require. (Garsh, J.)	
10/08/2014	Endorsement on Motion for Production of All Video and/or Audio Recordings of Him and/or His Counsel at the North Attleboro Police Station on June 17-18, 2013, (#144.0): No Action Taken Commonwealth represents that there is only one video and that it was produced and that there are no audio recordings. (Garsh, J.)	
10/09/2014	Event Result: The following event: Motion Hearing scheduled for 11/06/2014 02:30 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date Appeared:	
10/10/2014	ORDER: Findings of Fact , Rulings of Law and Order on Defendant's Motion to Suppress Cellular Telephone 203-606-8969 and Fruits Thereof	145
10/10/2014	ORDER: Findings of Fact, Rulings of Law, and Order on Defendant's Motion to Suppress Fruits of Unlawful Police Interrogation of Defendant During June 18, 2013 Search of his Home at Ronald C. Meyer Drive, North Attleboro, Including his Cell Phone Number 203-606-8969	146
10/10/2014	ORDER: Findings of Fact, Rulings of Law, and Order on Defendant's Motion to Suppress Evidence Seized from his Residence on June 22, 2013 that was Beyond the Scope of the Warrant	147
10/10/2014	Defendant 's Submission to to his Motion for a Change of Venue and declaration of John Della Volpe (Supplement)	148

Docket Date	Docket Text	File Ref Nbr.
10/10/2014	Opposition to paper #134.0 Motion for Change of Venue filed by Commonwealth	149
10/24/2014	Business records received from T Mobile	150
10/28/2014	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 10/30/2014 12:15 PM Motion Hearing.	151
10/29/2014	Defendant 's Response to Commonwealth's Opposition to Defendant's Motion for a Change of Venue (Reply)	152
10/30/2014	Event Result: The following event: Motion Hearing scheduled for 10/30/2014 12:15 PM has been resulted as follows: Result: Held as Scheduled Appeared:	
10/30/2014	List of exhibits Motion for Change of Venue	153
11/05/2014	Event Result: The following event: Motion Hearing scheduled for 11/10/2014 11:00 AM has been resulted as follows: Result: Canceled Reason: By Court prior to date Appeared:	
11/06/2014	Commonwealth 's Request to Conduct Video Deposition to Perpetuate Testimony of Witness Trooper John Conron; Affidavit	154
11/10/2014	ORDER: Memorandum of Decision and Order on Defendant Aaron Hernandez's Motion for a Change of Venue	155
11/13/2014	MEMORANDUM & ORDER: on Commonwealth's Request to Conduct Video Deposition to Perpetuate Testimony of Witness Trooper John Conron	156
11/14/2014	Opposition to paper #154.0 Commonwealth's Request to Conduct Video Deposition to Perpetuate Testimony of Witness Trooper John Conron filed by Aaron J Hernandez	157
11/17/2014	Affidavit of Richard N. Channick, M.D.	158
11/17/2014	Defendant 's Motion for Discovery of Witness Statements, Reports, or Notes Not Previously Disclosed	159
11/17/2014	Defendant 's Motion to Require the Commonwealth to Pare Down its Witnes List to Those Individuals It Actually Intends to Call to Testify In Its Case-In-Chief at Trial and for Other Necessary Relief; Memorandum of Law in Support; Affidavit of J.L. Sultan	160
11/17/2014	Defendant 's Motion of Extend Time for Filing Motions Regarding Jury Selection Procedures Until December 11, 2014	161
11/17/2014	Endorsement on Motion for Criminal Records, (#162.0): ALLOWED	
11/17/2014	Endorsement on Motion to Extend Time for Filing Motions Regarding Jury Selection Procedures Until December 11, 2014, (#161.0): ALLOWED Allowed. The Court intends to circulate to counsel by December 8, 2014 a draft juror questionnaire and to address the questionnaire, the mechanics of jury selection, and the number of jurors to be seated at the hearing on December 12, 2014.	
11/17/2014	Endorsement on Motion to Require the Commonwealth to Pare Down its Witness List to Those Individuals it Actually Intends to Call to Testify in Its Case-in-Chief at Trial and for Other Necesary Relief, (#160.0): Other action taken Commonwealth's opposition due by Thursday November 20, 2014.	
11/17/2014	Endorsement on Motion for Discovery of Witness Statements, Reports, or Notes Not Previously Disclosed, (#159.0): Other action taken Commonwealth's opposition due by Thursday November 20, 2014.	
11/17/2014	Other 's Request for Habeas Corpus for Defendant to appear for a deposition on 11/24/14 at 2PM	162.1
11/19/2014	Business records received from Verizon Wireless	163

Docket Date	Docket Text	File Ref Nbr.
11/21/2014	Defendant 's Motion for Return of Unlawfully-Seized Property	164
11/21/2014	Commonwealth 's Request for Extension on the Date to Provide Exhibit List; Affidavit; Certificate of Service	165
11/21/2014	Commonwealth 's Response to Defendant's Motion for Discovery of Witness Statements, Reports, or Notes Not Previously Disclosed	166
11/21/2014	Opposition to paper #160.0 Defendant's Motion to Require the Commonwealt to Pare3 Dow Its Witness List to Those Individuals It Actually Intends to Call to Testify in Its Case-In-Chief at Trial and for Other Necessary Relief filed by Aaron J Hernandez; Affidavit	167
11/24/2014	Endorsement on Motion for Discovery of Witness Statements, Reports, or Notes not Previously Disclosed, (#159.0): DENIED Commonwealth reports all discovery has been provided.	
11/24/2014	Endorsement on Motion to Require the Commonwealth to Pare Down Its Witness List to Those Individuals It Actually Intends to Call to Testify in Its Case-In-Chief as Trial and for Other Necessary Relief, (#160.0): DENIED Parties, however, are urged to pare down list to the extent practical to avoid an unnecessarily protracted trial.	
11/24/2014	Endorsement on Request for Extension on the Date to Provide Exhibit List, (#165.0): DENIED The time table is designed to allow filings of motions in limine on schedule. The filing deadline has already been, in effect, extended because the exhibit list was due on November 15. Exhibit list of exhibits Commonwealth in good faith intends to offer shall be filed by November 26, 2014. At this time, the Court is not extending time for filing motions in limine because of the late filing of the exhibit list.	
11/24/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
11/24/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Michael Kelley Fee, Esq. Attorney: William M McCauley, Esq.	
11/24/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Michael Kelley Fee, Esq. Attorney: William M McCauley, Esq.	
11/24/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Michael Kelley Fee, Esq. Attorney: William M McCauley, Esq.	
11/24/2014	Defendant 's Response to Commonwealth's Request for Extension on the Date to Provide Exhibit List	168
11/26/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Charles Wesley Rankin, Esq.	
12/01/2014	Event Result: The following event: Conference to Review Status scheduled for 01/06/2015 02:00 PM has been resulted as follows: Result: Not Held Reason: Transfered to another session Appeared:	
12/01/2014	Event Result: The following event: Jury Trial scheduled for 01/09/2015 09:00 AM has been resulted as follows: Result: Not Held	

Docket Date	Docket Text	File Ref Nbr.
	Reason: Transfered to another session Appeared:	
12/01/2014	Commonwealth 's Response to Defendant's Motion for Return of Property	169
12/03/2014	Commonwealth 's Application for a Certificate to Secure Attendance of a Witness Residing in the State of California filed under seal pursuant to G.L. c.268 s13D(e)	169.1
12/03/2014	Commonwealth 's Application for a Certificate to Secure Attendance of a Witness Residing in the State of Rhode Island filed under seal pursuant to G.L. c.268 s13D(e)	169.2
12/04/2014	Event Result: The following event: Motion Hearing scheduled for 12/12/2014 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Transfered to another session Appeared:	
12/04/2014	Event Result: The following event: Final Pre-Trial Conference scheduled for 12/12/2014 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Transfered to another session Appeared:	
12/04/2014	General correspondence regarding Notice of Change of Time The hearing scheduled for December 12, 2014 has been changed to 9:00 AM and will be held in Courtroom 7 at the Fall River Superior Court.	171
12/04/2014	Business records received from Webster Bank NA	172
12/05/2014	Defendant 's Motion in limine to Exclude Certain "Bad Acts Evidence" Specified in the Commonwealth's Notice Dated October 31, 2014 from the Commonwealth's Case-In-Chief and for Other Appropriate Relief; Memorandum of Law; Certificate of Service	173
12/05/2014	Defendant 's Motion in limine to Exclude Irrelevant and Unfairly Prejudicial Evidence (With Incorporated Memorandum of Law	174
12/05/2014	Defendant 's Motion in limine to Exclude Irrelevant and Otherwise Inadmissible Exhibits Listed on Commonwealth's Intended List of Exhibits Dated November 26, 2014	175
12/08/2014	ORDER: Order of Impoundment of Blank Juror Questionnaire	176
12/08/2014	General correspondence regarding Draft Juror Questionnaire	176.1
12/10/2014	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 12/12/2014 09:00 AM Final Pre-Trial Conference.	177
12/12/2014	Defendant 's Submission regarding Statement of Defendant Aaron Hernandez Concerning Proposed Confidential Questionnaire IMPOUNDED	179
12/12/2014	Defendant 's Motion for Indivdual Voir Dire Conduucted by Counsel	180
12/12/2014	Defendant Aaron J Hernandez's Memorandum in support of Defendant Aaron Hernandez's Motion for Individual Voir Dire Conducted by Counsel	180.1
12/12/2014	Defendant 's Motion for Additional Peremptory Challenges	181
12/12/2014	Defendant Aaron J Hernandez's Memorandum in support of Defendant's Motion for Additional Peremptory Challenges	181.1
12/12/2014	ORDER: Regarding Protocol, Public Attendance, and Media Coverage	183
12/12/2014	Transcipt ordered of December 12, 2014 in Courtroom 6.	184
12/15/2014	Business records received from Sprint/Nextel	185
12/16/2014	General correspondence regarding notification from Norfolk Superior Court on telephone hearing with Garsh, J. attached to Clerk's Minutes and JAVS disc is in back of file.	480

Docket Date	Docket Text	File Ref Nbr.
12/17/2014	Endorsement on Motion in limine to , (#170.0): Other action taken ALLOWED in part, DENIED in part. 12/142/2014 Rulings on the record.	
12/17/2014	Endorsement on Motion in limine to Exclude Certain "Bad Acts Evidence" Specified in the Commonwealth's Notice Dated October 31, 2014 from the Commonwealth's Case-In-Chief and for Other Appropriate Relief, (#173.0): Other action taken ALLOWED in part, DENIED in part. 12/12/2014 Rulings on the record.	
12/17/2014	Endorsement on Motion in limine to Exclude Irrelevant and Unfairly Prejudicial Evidence (With Incorporated Memorandum of Law), (#174.0): Other action taken ALLOWED in part, DENIED in part. 12/12/2014 Rulings on the record.	
12/18/2014	Habeas Corpus for defendant Issued to Suffolk County Jail returnable for 12/22/2014 09:15 AM Final Pre-Trial Conference.	186
12/19/2014	Commonwealth 's Response to Defendant's Supplemental Submission for Voir Dire Conducted by Counsel (IMPOUNDED)	187
12/19/2014	Commonwealth 's Response to Draft Juror Questionnaire	188
12/19/2014	Opposition to paper #181.0 Defendant's Motion for Additional Peremptory Challenges (IMPOUNDED) filed by Commonwealth	189
12/22/2014	Defendant 's Submission regarding Defendant's Supplemental Submission in Support of Previously-Filed Motion for Individual Voir Dire Conducted by Counsel – IMPOUNDED	190
12/22/2014	Endorsement on Motion for Return of Unlawfully-Seized Property, (#164.0): Other action taken See ruling on paper # 169.	
12/22/2014	Endorsement on Response to Defendant's Motion for Return of Property, (#169.0): ALLOWED without objection as to Hummer and items 2, 6 and 7 on order contained in paper # 140. No action taken on remaining items at this time. Defendant will renew when he wished action taken. (Garsh, J.)	
12/22/2014	Commonwealth 's Submission regarding Expert Testimony (Supplemental)	191
12/22/2014	Endorsement on Motion for Individual Voir Dire Conducted by Counsel, (#180.0): DENIED for the reasons stated on the record. (Garsh, J.) MAF	
12/22/2014	Endorsement on Motion for Additional Peremptory Challenges, (#181.0): DENIED for the reasons stated on the record. (Garsh, J.) MAF	
12/22/2014	's Joint Stipulation to Empanel 18 Jurors	192
12/22/2014	Witness list Applies To: Commonwealth (Prosecutor)	193
12/22/2014	Joint Pre-Trial Memorandum filed: Applies To: Commonwealth (Prosecutor)	194
12/22/2014	Commonwealth 's Submission of Commonwealth's Intended List of Exhibits	195
12/22/2014	ORDER: of Remand –The above named Defendant, Aaron Hernandez, is hereby Ordered Remanded to the custody of the Sheriff of the Bristol County House of Correction, on January 8, 2015 for trial to commence on January 9, 2015 at 9am at the Fall River Superior Court and for the duration of the trial.	196
12/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq.	

Docket Date	Docket Text	File Ref Nbr.
	Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
12/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
12/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
12/22/2014	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq.	
12/29/2014	General correspondence regarding Revised Juror Questionnaire	203.1
12/30/2014	Commonwealth 's Motion in limine regarding testimony of R. Paradis (Second)	204
12/30/2014	Commonwealth 's Motion in limine regarding Dr. Greenblatt	205
12/30/2014	Commonwealth 's Motion for a View	206
01/02/2015	General correspondence regarding notification from Norfolk Superior Court on telephone hearing with Garsh, J. attached to Clerk's Minutes and JAVS disc is in back of file	481
01/02/2015	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 01/06/2015 09:00 AM Final Pre-Trial Conference.	207
01/02/2015	Habeas Corpus for defendant issued to Suffolk County Jail returnable for 01/07/2015 09:00 AM Motion Hearing. CANCELED	208
01/02/2015	Defendant 's Motion in limine to Exclude Inadmissible Exhibits	209
01/02/2015	Defendant 's Motion in limine to Exclude Evidence Respecting Bracelets Obtained From Decedent By Medical Examiner	210
01/02/2015	Defendant 's Motion in limine to Exclude Specified Witnesses on Commonwealth's List of Potential Witnesses From Testifying or, in the Alternative, to Holod a Voir Dire of Such Witnesses	211
01/02/2015	Defendant 's Motion for a View	212
01/02/2015	Defendant 's Motion to Exempt His Mother and His Fiancee from Sequestration Order	213
01/02/2015	Defendant 's Motion for Reconsideration of Questions on Juror Questionnaire	214
01/02/2015	Affidavit filed by Defendant Aaron J Hernandez in support of Motion for Reconsideration of Questions on Juror Questionnaire	215
01/02/2015		216

Docket Date	Docket Text	File Ref Nbr.
	Defendant Aaron J Hernandez's Memorandum in support of Motion for Reconsideration of Questions on Juror Questionnaire	
01/02/2015	Endorsement on Motion for Reconsideration of Questions on Juror Questionnaire, (#214.0): ALLOWED in part, DENIED in part for the reasons stated on the record.	
01/05/2015	Commonwealth 's Response to the Defendant's Motion for a View	217
01/05/2015	Commonwealth 's Response to the Defendant's Motions Filed on December 29, 2014	218
01/05/2015	Commonwealth 's Response to the Defendant's Opposition to Motion for a View	219
01/05/2015	Defendant 's Motion to Confirm the Applicability of This Court's February 10, 2014 Order Prohibiting Prejudicial Extrajudicial Statements to the Bristol County Sheriff's Office and the Staff of the Bristol County Jail and House of Correction in North Dartmouth, Massachusetts	220
01/05/2015	Defendant 's Motion for Disclosure of All Proposed Summaries	221
01/06/2015	Commonwealth 's Request for Access to Records	223
01/06/2015	Defendant 's Motion for Access to Evidentiary Item to Conduct Independent Forensic Testing	224
01/06/2015	Defendant 's Response to Commonwealth's Motion for a View	225
01/06/2015	Endorsement on Motion to Exempt His Mother and His Fiancee from Sequestration Order, (#213.0): ALLOWED without objection, and the witness excluded from the sequestration order are: Ursula Ward, Shaquilla Thibou, Shaneah Jenkins, Terri Hernandez, Shayannah Jenkins.	
01/06/2015	Endorsement on Motion to Exclude Specified Witnesses on Commonwealth's List of Potential Witnesses from Testifying or, in the Alternative, to Hold a Voir Dire of Such Witnesses, (#211.0): ALLOWED without objection.	
01/06/2015	Endorsement on Motion in limine to Exclude Evidence Respecting Bracelets Obtained from Decedent by Medical Examiner, (#210.0): ALLOWED without objection.	
01/06/2015	Endorsement on Motion for a View, (#206.0): Other action taken Allowed in part, denied in part. Ruling on the Record. Specifically, 10, 11, 12, 13 allowed without objection; 2, 3, 5, 6, 7 allowed after hearing.	
01/06/2015	Endorsement on Motion in limine to Exclude Inadmissible Exhibits, (#209.0): Other action taken See Marginal Rulings.	
01/06/2015	Endorsement on Request for Access to Records, (#223.0): ALLOWED without objection. Access limited to counsel.	
01/06/2015	Endorsement on Motion for a View, (#212.0): ALLOWED Counsel shall work out excluded areas of the house prior to the view.	
01/06/2015	Endorsement on Response to the Defendant's Motion for a View, (#217.0): Other action taken Denied to the extent photographs or other items will be covered or removed. Counsel shall walk through the home prior to the view. Full ruling on the record.	
01/06/2015	Business records received from Walmart	226
01/06/2015	Business records received from Verizon Wireless	227
01/06/2015	Event Result: The following event: Conference to Review Status scheduled for 01/06/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared:	

Docket Date	Docket Text	File Ref Nbr.
01/07/2015	Event Result: The following event: Motion Hearing scheduled for 01/07/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/07/2015	Business records received from Suffolk County Sheriff's Department	231
01/07/2015	Commonwealth 's Submission regarding Additional Response to Defendant's Motion to Confirm Court's Orders Regarding Pretrial Publicity	233
01/09/2015	Commonwealth 's Response to the Defendant's Motion for Disclosure of Summaries to Be Used in Opening	234
01/09/2015	Commonwealth 's Motion for Reciprocal Discovery	235
01/09/2015	Commonwealth 's Motion in limine regarding Defendant's Use of Hearsay Testimony	236
01/09/2015	Business records received from Verizon Wireless	237
01/09/2015	Endorsement on Motion for Access to Evidentiary Item to Conduct Independent Forensic Testing, (#224.0): ALLOWED without objection	
01/09/2015	Business records received from Merrill Lynch	239
01/09/2015	Endorsement on Motion for Disclosure of All Proposed Summaries, (#221.0): ALLOWED After review, ALLOWED as to all chalks (summaries) Commonwealth intends to display to the jury - not just those for openings. Commonwealth shall provide copies to extent not previously provided and to extent previously provided, Commonwealth shall indicate which of the many summaries it may have provided, it actually intends to use at the trial. Disclosure shall be made by January 15, 2015.	
01/09/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
01/09/2015	Other 's Request for Reconsideration (of certain issues relative to the voir dire process)	240
01/09/2015	Endorsement on Request for for Reconsideration (of certain issues relative to the voir dire process), (#240.0): Other action taken The Court does not generally act on correspondence. However, in order to clarify the voir dire process the Court is employing, the court reiterates that public access to the individual voir dire has not been restricted, as Cable News Network, Inc. posits. Conducting individual voir dire at sidebar, as requested by the defendant, is a practice that has been specifically found to be constitutional by the Supreme Judicial Court. See Commonwealth v. Cohen, 456 Mass. 94, 117 (2010) ("Individual voir dire examinations in this case were conducted out of hearing of the defendant and the public, but the voir dire examination process itself, took place, as it should have, in open court. Conducting such voir dire examinations in open court permists memebers of the public to observe the judge, as well as the prospective jurors. Even though the public cannot hear what is being said, the ability to observe itself furthers the values that the public trial right is designed to protect . . . The defendant had a right to have the public present during these individual juror examinations, just as he had a right during the trial to have spectators present in the court room while sidebar conferences took place out of their earshot). In Commonwealth v. Greindeder, 458 Mass. 207, 228 (2010), the Court cited Cohen for the proposition that individual juror voir direconducted out of hearing of the public is permissible if conducted in open court where the public may observe the process. "The same constitutional analysis applies to a public trial claim brought under the First Amendment as one brought . . . under the Sixth Amendment." Cohen, 456 Mass. at 106.	
01/09/2015	Event Result: The following event: Jury Trial scheduled for 01/09/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/12/2015		

Docket Date	Docket Text	File Ref Nbr.
	Event Result: The following event: Jury Trial scheduled for 01/12/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/13/2015	Business records received from Sprint	241
01/13/2015	Event Result: The following event: Jury Trial scheduled for 01/13/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/13/2015	General correspondence regarding Confidential Juror Questionnaire (Blank)	242
01/14/2015	Endorsement on Notice regarding removal of Impoundment on Statement of Defendant A. Hernandez Concerning Proposed Confidential Jury Questionnaire, (#179.0): No Action Taken	
01/14/2015	Endorsement on Notice regarding unimpoundment of Memorandum of Law in Support of Defendant A. Hernandez's Motion for Individual Voir Dire Conducted by Counsel, (#180.1): No Action Taken	
01/14/2015	Endorsement on Notice regarding removal of Impoundment of Commonwealth's Impounded Response to Defendant's Supplemental Subission for Voir Dire conducted by Counsel, (#187.0): No Action Taken	
01/14/2015	Endorsement on Notice regarding removal of Impoundment of Defendant's Supplemental Submission In Support of Previously-Filed Motion for Individual Voir Dire Conducted by Counsel, (#190.0): No Action Taken	
01/14/2015	Endorsement on Notice regarding removal of Impoundment of Defendant's Motion for Reconsideration of Questions on Juror Questionnaire, (#214.0): No Action Taken	
01/14/2015	Endorsement on Notice regarding removal of Impoundment of the Affidavit of J.L. Sultan In Support of Defendant's Motion for Reconsideration of Questions on Juror Questionnaire, (#215.0): No Action Taken	
01/14/2015	Endorsement on Notice regarding removal of Impoundment of the Memorandum of Law in Support of Defendant's Motion for Reconsideration of Questions on Juror Questionnaire, (#216.0): No Action Taken	
01/15/2015	Business records received from AT&T	244
01/15/2015	Business records received from Verizon Wireless	245
01/15/2015	Defendant 's Motion for Reconsideration Regarding Timing of Parties' Exercise of Peremptory Challenges	246
01/15/2015	Defendant 's Motion for Disclosure of Promises, Rewards, or Inducements Respecting Shayanna Jenkins and Oscar Hernandez, Jr.	247
01/15/2015	Defendant 's Motion to Exclude Evidence, filed under seal	248
01/15/2015	Defendant 's Response to Commonwealth's Motion for Reciprocal Discovery	249
01/15/2015	Opposition to paper #205.0 Commonwealth's Motion in Limine to Exclude Testimony of Dr. David Greenblatt filed by Commonwealth	250
01/15/2015	Affidavit of David J. Greenblatt, M.D.	250.1
01/15/2015	Opposition to paper #204.0 Commonwealth's Second Motion in Limine filed by Commonwealth	251
01/15/2015	Event Result: The following event: Jury Trial scheduled for 01/15/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/15/2015	Endorsement on Motion for Reconsideration Regarding Timing of Parties' Exercise of Peremptory Challenges, (#246.0): Other action taken After further reconsideration, allowed in part.	
01/16/2015	Event Result: The following event: Jury Trial scheduled for 01/16/2015 08:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/20/2015	Business records received from AT&T	252

Docket Date	Docket Text	File Ref Nbr.
01/20/2015	Business records received from Bank of America (SJ)	253
01/20/2015	Business records received from Bank of America (GH)	254
01/20/2015	Business records received from Bank of America (AH)	255
01/20/2015	Business records received from Collateral Consultants	256
01/20/2015	Business records received from Suffolk County Sheriff's Office	257
01/20/2015	Event Result: The following event: Jury Trial scheduled for 01/20/2015 08:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/21/2015	Event Result: The following event: Jury Trial scheduled for 01/21/2015 08:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/21/2015	Business records received from Bank of America (AH)	258
01/21/2015	Business records received from Enterprise Rent-A-Car	264
01/22/2015	Event Result: The following event: Jury Trial scheduled for 01/22/2015 08:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/23/2015	Defendant 's Motion in limine for Brief, Follow-up Voir Dire of Potential Jurors Prior to Empanelment Filed Under Seal	266
01/23/2015	Event Result: The following event: Jury Trial scheduled for 01/23/2015 08:30 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/23/2015	Endorsement on Motion for Disclosure of Promises, Rewards, or Inducements Respecting Shayanna Jenkins and Oscar Hernandez, Jr., (#247.0): ALLOWED without objections	
01/26/2015	Commonwealth 's Motion in limine to Exclude the Expert Testimony of David J. Greenblatt, M.D.	269
01/26/2015	Endorsement on Motion for Disclosure of Transcript of Shayanna Jenkins Immunity Hearing, (#268.0): ALLOWED Counsel may order a copy of the transcript, however, it shall not be publicly disseminated pursuant to G.L. C. 233, sec. 20C, et.seq.	
01/26/2015	Event Result: The following event: Jury Trial scheduled for 01/26/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
01/27/2015	Event Result: The following event: Jury Trial scheduled for 01/27/2015 09:00 AM has been resulted as follows: Result: Canceled Reason: Court Closure Appeared:	
01/28/2015	Event Result: The following event: Jury Trial scheduled for 01/28/2015 09:00 AM has been resulted as follows: Result: Canceled Reason: Court Closure Appeared:	
01/29/2015	Event Result: The following event: Jury Trial scheduled for 01/29/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	

Docket Date	Docket Text	File Ref Nbr.
01/29/2015	Endorsement on Motion for Reciprocal Discovery, (#235.0): ALLOWED in part, DENIED in part. Rulings on the record.	
01/29/2015	Endorsement on Motion of Motion in limine regarding Defendant's Use of Hearsay Testimony, (#236.0): No Action Taken at the request of the Commonwealth	
01/29/2015	Business records received from Greyhound	270
01/30/2015	Event Result: The following event: Jury Trial scheduled for 01/30/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Michel, Jr., Esq., Roger Lee Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L Applies To: Hernandez, Aaron J (Defendant); Sultan, Esq., James L (Attorney) on behalf of Hernandez, Aaron J (Defendant); Rankin, Esq., Charles Wesley (Attorney) on behalf of Hernandez, Aaron J (Defendant); Bomberg, Esq., Patrick Otto (Attorney) on behalf of Commonwealth (Prosecutor); Griffin, Esq., Brian D (Attorney) on behalf of Commonwealth (Prosecutor); McCauley, Esq., William M (Attorney) on behalf of Commonwealth (Prosecutor); Fee, Esq., Michael Kelley (Attorney) on behalf of Hernandez, Aaron J (Defendant)	
01/30/2015	Business records received from The Hertz Corporation	271
02/02/2015	Event Result: The following event: Jury Trial scheduled for 02/02/2015 09:00 AM has been resulted as follows: Result: Canceled Reason: Court Closure Appeared:	
02/03/2015	Defendant 's Notice of Prospective Expert Testimony (Supplemental)	272
02/03/2015	Event Result: The following event: Jury Trial scheduled for 02/03/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/04/2015	ORDER: Impoundment	273
02/04/2015	Event Result: The following event: Jury Trial scheduled for 02/04/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/05/2015	Event Result: The following event: Jury Trial scheduled for 02/05/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/05/2015	Other 's Motion for daily access to exhibits filed by Cable News Network, Inc.	274

Docket Date	Docket Text	File Ref Nbr.
02/05/2015	Other 's EMERGENCY Motion to be heard on motion seeking access to trial court exhibits filed by Cable News Network, Inc.	275
02/06/2015	Event Result: The following event: Jury Trial scheduled for 02/06/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/06/2015	Opposition to paper #269.0 Motion in Limine to Exclude the Expert Testimony of D. J. Greenblatt, MD filed by Commonwealth	276
02/06/2015	Endorsement on Motion for Daily Access to Exhibits (Cable News Network, Inc.), (#274.0): DENIED See Ruling on Record	
02/06/2015	Endorsement on Motion to Be Heard on Motion Seeking Access to Trial Court Exhibits (Emergency) by Cable News Network, Inc., (#275.0): ALLOWED	
02/09/2015	Event Result: The following event: Jury Trial scheduled for 02/09/2015 09:00 AM has been resulted as follows: Result: Not Held Reason: Court Closure Appeared:	
02/10/2015	Endorsement on Application for a Judicial Order of Immunity to Shayanna Jenkins (filed under seal), (#228.0): ALLOWED	
02/10/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: William M McCauley, Esq.	
02/10/2015	MEMORANDUM & ORDER: on Cable News Network, Inc's. Motin for Daily Access to Exhibits: . . . For the foregoing reasons, it is hereby ORDERED that Cable News Network, Inc's. Motion for Daily Access to Exhibits be DENIED.	278
02/10/2015	Event Result: The following event: Jury Trial scheduled for 02/10/2015 09:00 AM has been resulted as follows: Result: Not Held Reason: Court Closure Appeared:	
02/11/2015	Event Result: The following event: Jury Trial scheduled for 02/11/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/11/2015	Event Result: The following event: Jury Trial scheduled for 02/12/2015 09:00 AM has been resulted as follows: Result: Not Held Reason: By Court prior to date Appeared:	
02/12/2015	Business records received from Sprint Nextel	279
02/12/2015	Business records received from Enterprise Rental	280
02/13/2015	Event Result: The following event: Jury Trial scheduled for 02/13/2015 09:00 AM has been resulted as follows:	

Docket Date	Docket Text	File Ref Nbr.
	Result: Held as Scheduled Appeared: Applies To: Hernandez, Aaron J (Defendant); Sultan, Esq., James L (Attorney) on behalf of Hernandez, Aaron J (Defendant); Rankin, Esq., Charles Wesley (Attorney) on behalf of Hernandez, Aaron J (Defendant); Bomberg, Esq., Patrick Otto (Attorney) on behalf of Commonwealth (Prosecutor); Griffin, Esq., Brian D (Attorney) on behalf of Commonwealth (Prosecutor); McCauley, Esq., William M (Attorney) on behalf of Commonwealth (Prosecutor); Fee, Esq., Michael Kelley (Attorney) on behalf of Hernandez, Aaron J (Defendant)	
02/17/2015	Event Result: The following event: Jury Trial scheduled for 02/17/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/18/2015	Event Result: The following event: Jury Trial scheduled for 02/18/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/18/2015	Endorsement on Motion regarding Commonwealth's second Motion in Limine, (#204.0): DENIED See Ruling on Record	
02/18/2015	List of exhibits - Exhibit #2 (Grand Jury Testimony of Robert Paradis) is sealed pursuant to G.L. c. 268, sec. 13D	281
02/19/2015	Event Result: The following event: Jury Trial scheduled for 02/19/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/20/2015	Commonwealth 's Submission regarding Opposition to Defendant's Request to Exclude the Testimony of Dorothy Stout	282
02/20/2015	Event Result: The following event: Jury Trial scheduled for 02/20/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/20/2015	Business records received from Cheshire Correctional Institution	283
02/20/2015	Defendant 's Motion for a Court Order Regarding Display of Home Video Surveillance	284
02/23/2015	Event Result: The following event: Jury Trial scheduled for 02/23/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/24/2015	Event Result: The following event: Jury Trial scheduled for 02/24/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J	

Docket Date	Docket Text	File Ref Nbr.
	Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/25/2015	Event Result: The following event: Jury Trial scheduled for 02/25/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/26/2015	Event Result: The following event: Jury Trial scheduled for 02/26/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
02/27/2015	Event Result: The following event: Jury Trial scheduled for 02/27/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
02/27/2015	Defendant 's Motion to Preclude Admission or Display of a Glock .45 Caliber Pistol Before the Jury	285
03/02/2015	Opposition to #285.0 Defendant's Motion to Preclude Admisison or Dismplay of a Glock .45 Caliber Pistol Before the Jury filed by Commonwealth	287
03/02/2015	Commonwealth 's Motion in limine regarding Video	288
03/02/2015	Commonwealth 's Motion in limine to Admit Evidence of a Prior Shooting Incident Involving Alexander Bradley (Renewed)	289
03/02/2015	Event Result: The following event: Jury Trial scheduled for 03/02/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/02/2015	Event Result: The following event: Jury Trial scheduled for 03/03/2015 09:00 AM has been resulted as follows: Result: Not Held Reason: Transfered to another session Appeared:	
03/03/2015	Opposition to paper #289.0 Commonwealth 's Motion in limine to Admit Evidence of a Prior Shooting Incident Involving Alexander Bradley (Renewed) filed by Aaron J Hernandez	290
03/03/2015	Endorsement on Motion to Preclude Admission or Display of a Glock .45 Caliber Pistol Before the Jury, (#285.0): DENIED Ruling on the Record. (Garsh, J.) MAF	
03/03/2015	Event Result: The following event: Jury Trial scheduled for 03/03/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/04/2015	Event Result: The following event: Jury Trial scheduled for 03/04/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto	

Docket Date	Docket Text	File Ref Nbr.
	Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/05/2015	Event Result: The following event: Jury Trial scheduled for 03/05/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/06/2015	Event Result: The following event: Jury Trial scheduled for 03/06/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/06/2015	Defendant 's Motion for Leave to Elicit Testimony on Cross-Examination that the Commonwealth Failed to Obtain Ernest Wallace's DNA	291
03/06/2015	Endorsement on Motion for Leave to Elicit Testimony on Cross-Examination that the Commonwealth Failed to Obtain Ernest Wallace's DNA, (#291.0): ALLOWED For the reasons stated on the record. (Garsh, J.)	
03/09/2015	Event Result: The following event: Jury Trial scheduled for 03/09/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/09/2015	Opposition to paper #288.0 Motion in limine regarding Video filed by Aaron J Hernandez	294
03/09/2015	Business records received from Cheshire Correctional Institution	295
03/10/2015	Event Result: The following event: Jury Trial scheduled for 03/10/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/11/2015	Event Result: The following event: Jury Trial scheduled for 03/11/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/12/2015	Event Result: The following event: Jury Trial scheduled for 03/12/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/13/2015	Event Result: The following event: Jury Trial scheduled for 03/13/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	

Docket Date	Docket Text	File Ref Nbr.
	Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/17/2015	Defendant 's Motion for Leave to File Defendant's Motion to Suppress Fruits of November 24, 2014 Search Warrant	296
03/17/2015	Defendant 's Motion to Suppress Fruits of November 24, 2014 Search Warrant	297.1
03/17/2015	Defendant Aaron J Hernandez's Memorandum in support of Defendant's Motion to Suppress Fruits of November 24, 2014 Search Warrant	297.2
03/17/2015	Opposition to paper #297.1 Defendant's Motion to Suppress Fruits of November 24, 2014 Search Warrant filed by Commonwealth	298
03/17/2015	Event Result: The following event: Jury Trial scheduled for 03/17/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/17/2015	General correspondence regarding Decision and Judgement concerning the Commonwealth's c. 211, sec. 3 appeal concerning testimony of Robert Paradis - Cordy, J. Petitioned is DENIED.	299
03/17/2015	General correspondence regarding Decision and Judgement concerning the Commonwealth's c. 211, sec. 3 appeal concerning Alexander Bradley Evidence- Cordy, J. Petitioned is DENIED.	300
03/17/2015	Endorsement on Motion for Leave to File Defendant's Motion to Suppress Fruits of November 24, 2014 Search Warrant, (#296.0): ALLOWED	
03/17/2015	Endorsement on Motion to Suppress Fruits of November 24, 2014 Search Warrant, (#297.1): DENIED for the reasons stated on the record, after hearing. (Ruling on the record) (Garsh, J.)	
03/18/2015	Defendant 's Motion to Permit Defense Expert to Examine Ballistics Evidence	302
03/18/2015	Event Result: The following event: Jury Trial scheduled for 03/18/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/18/2015	Witness 's Motion to Quash Out of State Subpoena/Waiver Request for Protective Order	303
03/18/2015	Endorsement on Motion to Preclude Admission of Evidence or Argument Suggesting that the Failure of the Commonwealth to Locate and Seize Three Pairs of Shoes Pursuant to Warrant on November 24, 2014 was Attributable to the Defendant and Thus Supports an Inference of Consciousness of Guilt, (#301.0): Other action taken Allowed in part, denied in part at sidebar conference, for the reasons stated on the record. (Garsh, J.)	
03/18/2015	Defendant 's Motion in limine to Exclude Evidence of Jail Telephone Conversations Recorded by the Commonwealth	304
03/18/2015	Affidavit of Michael K. Fee in Support of Defendant's Motion in Limine to Exclude Evidence of Jail Telephone Conversations	304.1
03/18/2015	Endorsement on Motion to Permit Defense Expert to Examine Ballistics Evidence, (#302.0): ALLOWED	
03/18/2015	Endorsement on Motion to Quash Out of State Subpoena/Waiver Request for protective Order, (#303.0): DENIED	

Docket Date	Docket Text	File Ref Nbr.
	(Ruling on the Record)	
03/19/2015	Event Result: The following event: Jury Trial scheduled for 03/19/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/20/2015	Event Result: The following event: Jury Trial scheduled for 03/20/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/20/2015	General correspondence regarding Letter from the Supreme Judicial Court notifying this court of a Notice of Appeal from the March 11, 2015 decision of a Single Justice	305
03/20/2015	Endorsement on Motion to Exclude Hearsy Statement, (#306.0): ALLOWED Without Opposition	
03/23/2015	Event Result: The following event: Jury Trial scheduled for 03/23/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/23/2015	Opposition to paper #304.0 Defendant's Motion in Limine to Exclude Evidence of Jail Telephone Conversations filed by Defendant	307
03/23/2015	Commonwealth 's Application for for a Judicial Order of Immunity to Gion Jackson	308
03/23/2015	ORDER: Concerning Grant of Immunity to Gion Jackson pursuant to G.L. c. 233, sections 20C-20E	309
03/24/2015	Event Result: The following event: Jury Trial scheduled for 03/24/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/25/2015	Defendant 's Motion for Discovery of Email Correspondence of Trooper Eric Benson	310
03/25/2015	Defendant 's Motion for Order that Commonwealth Provide Defendant with all Transcripts, Draft Transcripts, and Summaries of Jail Calls	311
03/25/2015	Event Result: The following event: Motion Hearing scheduled for 03/25/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto	

Docket Date	Docket Text	File Ref Nbr.
	Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley	
03/25/2015	Endorsement on Motion for Order that Commonwealth Provide Defendant with all Transcripts, Drafts Transcripts, and Summaries of Jail Calls, (#311.0): Other action taken 3/25/15 To the extent there are transcripts, they are ordered to be provided and the Commonwealth represents it has so produced them and the rest in its possession consists of notes taken by a prosecutor upon listening to the tapes, which the defendant does not seek.	
03/25/2015	MEMORANDUM & ORDER: on Defendant's Motion in Limine to Exclude Evidence of Jail Telephone Conversations Recorded by the Commonwealth (ALLOWED, in part, and DENIED in part)	312
03/26/2015	Event Result: The following event: Jury Trial scheduled for 03/26/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/27/2015	Defendant Aaron J Hernandez's Memorandum in support of Motion to Limit Testimony of Shayana Jenkins and for Voir Dire (Supplemental)	315
03/27/2015	Event Result: The following event: Jury Trial scheduled for 03/27/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/27/2015	Endorsement on Motion to Limit Testimony of Shayanna Jenkins and for Voir Dire, (#313.0): Other action taken Allowed in part, denied in part. Ruling on the Record. (Garsh, J.)	
03/30/2015	Event Result: The following event: Jury Trial scheduled for 03/30/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
03/30/2015	Defendant 's Motion to Reconsider Admissibility and Exclude Testimony of Alexander Bradley	316
03/31/2015	Event Result: The following event: Jury Trial scheduled for 03/31/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
03/31/2015	Endorsement on Motion in limine to Limit the Testimony of Robert Paradis Respecting the Defendant's Personality, Character, Behavior and Drug Use, (#317.0): Other action taken	

Docket Date	Docket Text	File Ref Nbr.
	Allowed in part, denied in part. Ruling on the Record.	
03/31/2015	Defendant 's Motion to Preclude Trooper Dumont from Repeating Testimony About Cell Tower Location Information and Times for Route of Travel	318
04/01/2015	Event Result: The following event: Jury Trial scheduled for 04/01/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/01/2015	Defendant 's Motion for Comprehensive Voir Dire of Alexander Bradley's Proposed Direct Testimony and for Leave to Impeach Witness for Bias Because of Pending Cases	319
04/01/2015	Endorsement on Application for a Judicial Order of Immunity to Alexander Bradley, (#320.0): ALLOWED (See Order)	
04/01/2015	ORDER: Concerning Grant of Immunity to Alexander Bradley Pursuant to G.L. c. 233, sections 20C-20E	321
04/01/2015	Endorsement on Motion to Reconsider Admissibility and Exclude Testimony of Alexander Bradley, (#316.0): DENIED Ruling on the Record	
04/01/2015	Endorsement on Motion for Comprehensive Voir Dire of Alexander Bradley's Proposed Direct Testimony and for Leave to Impeach Witness for Bias Because of Pending Cases, (#319.0): ALLOWED Rulings on the record.	
04/02/2015	Event Result: The following event: Jury Trial scheduled for 04/02/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
04/02/2015	Defendant 's Motion for Required Finding of Not Guilty on Indictments 2013-983-1 and 2013-983-2 at the End of the Commonwealth's Case	322
04/02/2015	Defendant Aaron J Hernandez's Memorandum in support of Defendant's Motion for Required Finding of Not Guilty on Indictments 2013-983-1 and 2013-983-2 at the End of the Commonwealth's Case	323
04/02/2015	Defendant 's Request for Jury Instructions	324
04/02/2015	Commonwealth 's Request for Jury Instruction	325
04/03/2015	Event Result: The following event: Jury Trial scheduled for 04/03/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez; Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
04/03/2015	Endorsement on Motion for Required Finding of Not Guilty on Inidctments 2013-983-1 and 2013-983-2 at the End of the Commonwealth's Case, (#322.0): DENIED See Ruling on Record	
04/03/2015		

Docket Date	Docket Text	File Ref Nbr.
	Endorsement on Request for Jury Instructions, (#324.0): Other action taken Rulings on the record during charge conference	
04/03/2015	Endorsement on Request for Jury Instruction, (#325.0): Other action taken Rulings on the record during charge conference	
04/03/2015	Defendant 's Request for Jury Instructions (First Supplemental)	326
04/03/2015	Defendant Aaron J Hernandez's Memorandum in opposition to Commonwealth's Motion to Exclude Testimony of Dr. David J. Greenblatt (Supplemental)	326.5
04/06/2015	Defendant 's Supplemental Motion for Jury Instructions (Second Request)	327
04/06/2015	Defendant Aaron J Hernandez's Memorandum Respecting Defendant's Non-Duty to Provide Information to Police	328
04/06/2015	Event Result: The following event: Jury Trial scheduled for 04/06/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Defendant Hernandez, Aaron J Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Bomberg, Esq., Patrick Otto Attorney Fee, Esq., Michael Kelley Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
04/06/2015	Endorsement on Motion in limine to Exclude Testimony of Dr. David Greenblatt, (#205.0): DENIED See Ruling on the Record	
04/06/2015	Defendant 's Request for Jury Instructions (Third Supplemental)	329
04/07/2015	Defendant 's Motion for Required Finding of Not Guilty on Indictments 2013-983-1 and 2013-983-2 at the Close of all the Evidence	330
04/07/2015	Event Result: The following event: Jury Trial scheduled for 04/07/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/07/2015	Endorsement on Motion for Required Finding of Not Guilty on Indictments 2013-983-1 and 2013-983-2 at the Close of all the Evidence, (#330.0): DENIED See ruling on the record.	
04/07/2015	Opposition to paper #329.0 Defendant's Request for a "Missing Witness" Instruction filed by Commonwealth	331
04/08/2015	Event Result: The following event: Jury Trial scheduled for 04/08/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/09/2015	Event Result: The following event: Jury Trial scheduled for 04/09/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/09/2015	ORDER: Re: Contact with a Juror	332
04/09/2015	Transcript received regarding sidebar with Jurors	333
04/10/2015	Event Result: The following event: Jury Trial scheduled for 04/10/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	

Docket Date	Docket Text	File Ref Nbr.
04/13/2015	Event Result: The following event: Jury Trial scheduled for 04/13/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/14/2015	Event Result: The following event: Jury Trial scheduled for 04/14/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/14/2015	CD of Transcript of 12/12/2014 09:00 AM Final Pre-Trial Conference received from Court Reporter Marilyn Silvia.	334
04/15/2015	Event Result: The following event: Jury Trial scheduled for 04/15/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
04/15/2015	List of jurors filed. List Identifying the Names of Jurors Who Have Been Empanelled and Rendered a Verdict	335
04/15/2015	List of exhibits	336
04/15/2015	Verdict affirmed, verdict slip filed Verdict Returned as to Indictment 2013-983-1, which was presented to the Jury as 2013-983-A.	337
04/15/2015	Verdict affirmed, verdict slip filed Verdict Returned as to Indictment 2013-983-2, which was presented to the Jury as 2013-983-B.	338
04/15/2015	Verdict affirmed, verdict slip filed Verdict Returned as to Indictment 2013-983-6, which was presented to the Jury as 2013-983-C.	339
04/15/2015	Offense Disposition: Charge #1 MURDER c265 §1 Date: 04/15/2015 Method: Jury Trial Code: Guilty Verdict Judge: Garsh, Hon. Susan E Charge #2 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) Date: 04/15/2015 Method: Jury Trial Code: Guilty Verdict Judge: Garsh, Hon. Susan E Charge #6 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Date: 04/15/2015 Method: Jury Trial Code: Guilty Verdict Judge: Garsh, Hon. Susan E	
04/15/2015	Sentence Date: 04/15/2015 Judge: Garsh, Hon. Susan E Charge #: 1 MURDER c265 §1 Life Served Primary Charge Charge #: 2 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) State Prison Sentence State Prison Sentence-Not Less Than: 2 Years, 6 Months, 0 Days State Prison Sentence-Not More Than: 3 Years, 0 Months, 0 Days Served Concurrently Charge # 1 Case 1373CR983 Charge #: 6 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)	

Docket Date	Docket Text	File Ref Nbr.
	Committed Term: 1 Years, 0 Months, 0 Days To Serve: 1 Years, 0 Months, 0 Days Served Concurrently Charge # 1 Case 1373CR983 Committed to MCI - Cedar Junction (at Walpole) Credits 659 Days Financials Docket Type Victim/Witness Assessment on felony G.L. c. 258B, § 8. Amount $90.00 Miscellaneous Options Further Orders of the Court: DEEMED SERVED AS TO OFFENSE 6	
04/15/2015	Defendant warned as to submission of DNA G.L. c. 22E, § 3	
04/15/2015	Defendant notified of right of appeal to the Appelate Division of the Superior Court within ten (10) days.	
04/15/2015	Defendant advised of an automatic review to the Supreme Judicial Court pursuant to MGL Ch. 278 Sec. 33E.	
04/15/2015	Issued on this date: Mitt For Sentence (First 8 charges) Sent On: 04/15/2015 12:15:35	340
04/15/2015	ORDER: The Impoundment order dated February 4, 2015 Pleading #273 is VACATED in its entirety	
04/21/2015	Defendant 's Motion for Required Finding of Not Guilty on Counts 1 and 2 or for other Relief	341
04/21/2015	Notice of appeal from sentence to MCI - Cedar Junction (at Walpole) filed by defendant	343
04/22/2015	Endorsement on Motion for Required Finding of Not Guilty on Counts 1 and 2 or for other Relief, (#341.0): No Action Taken Defendant's request to file supporting memorandum to his renewed motion for Required Finding of Not Guilty is Allowed, and the memorandum shall be filed on or before May 7, 2015	
04/22/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq.	
04/30/2015	Letter transmitted to the Appellate Division.	
04/30/2015	Document: Letter to the Appellate Division Sent On: 04/30/2015 14:25:10	344
05/01/2015	Court Reporter Karoline Crawford is hereby notified to prepare one copy of the transcript of the evidence of 06/16/2014 09:00 AM Non-Evidentiary Hearing on Motion to Suppress	345
05/01/2015	Court Reporter Ann Marie McDonald is hereby notified to prepare one copy of the transcript of the evidence of 08/11/2014 09:00 AM Motion Hearing	346
05/01/2015	Court Reporter Linda Kelly is hereby notified to prepare one copy of the transcript of the evidence of 09/30/2014 09:00 AM Motion Hearing, 10/01/2014 09:00 AM Motion Hearing, 10/02/2014 09:00 AM Motion Hearing	347

Docket Date	Docket Text	File Ref Nbr.
05/01/2015	Court Reporter Debra Keefer is hereby notified to prepare one copy of the transcript of the evidence of 10/08/2014 02:00 PM Evidentiary Hearing on Suppression	348
05/01/2015	Court Reporter Lori Saulnier is hereby notified to prepare one copy of the transcript of the evidence of 01/07/2015 09:00 AM Motion Hearing, 01/09/2015 09:00 AM Jury Trial, 01/12/2015 09:00 AM Jury Trial, 01/13/2015 09:00 AM Jury Trial, 01/15/2015 09:00 AM Jury Trial, 01/16/2015 08:30 AM Jury Trial, 01/20/2015 08:30 AM Jury Trial, 01/21/2015 08:30 AM Jury Trial, 01/22/2015 08:30 AM Jury Trial, 01/23/2015 08:30 AM Jury Trial, 01/26/2015 09:00 AM Jury Trial, 01/27/2015 09:00 AM Jury Trial, 01/28/2015 09:00 AM Jury Trial, 01/29/2015 09:00 AM Jury Trial, 01/30/2015 09:00 AM Jury Trial, 02/02/2015 09:00 AM Jury Trial, 02/03/2015 09:00 AM Jury Trial, 02/04/2015 09:00 AM Jury Trial, 02/05/2015 09:00 AM Jury Trial, 02/06/2015 09:00 AM Jury Trial, 02/09/2015 09:00 AM Jury Trial, 02/10/2015 09:00 AM Jury Trial, 02/11/2015 09:00 AM Jury Trial	349
05/01/2015	Court Reporter Lori Saulnier is hereby notified to prepare one copy of the transcript of the evidence of 02/12/2015 09:00 AM Jury Trial, 02/13/2015 09:00 AM Jury Trial, 02/17/2015 09:00 AM Jury Trial, 02/18/2015 09:00 AM Jury Trial, 02/19/2015 09:00 AM Jury Trial, 02/20/2015 09:00 AM Jury Trial, 02/23/2015 09:00 AM Jury Trial, 02/24/2015 09:00 AM Jury Trial, 02/25/2015 09:00 AM Jury Trial, 02/26/2015 09:00 AM Jury Trial, 02/27/2015 09:00 AM Jury Trial, 03/02/2015 09:00 AM Jury Trial, 03/03/2015 09:00 AM Jury Trial, 03/04/2015 09:00 AM Jury Trial, 03/05/2015 09:00 AM Jury Trial, 03/06/2015 09:00 AM Jury Trial, 03/09/2015 09:00 AM Jury Trial, 03/10/2015 09:00 AM Jury Trial, 03/11/2015 09:00 AM Jury Trial, 03/12/2015 09:00 AM Jury Trial, 03/13/2015 09:00 AM Jury Trial	350
05/01/2015	Court Reporter Lori Saulnier is hereby notified to prepare one copy of the transcript of the evidence of 03/17/2015 09:00 AM Jury Trial, 03/18/2015 09:00 AM Jury Trial, 03/20/2015 09:00 AM Jury Trial, 03/23/2015 09:00 AM Jury Trial, 03/24/2015 09:00 AM Jury Trial, 03/25/2015 09:00 AM Motion Hearing, 03/26/2015 09:00 AM Jury Trial, 03/27/2015 09:00 AM Jury Trial, 03/30/2015 09:00 AM Jury Trial, 03/31/2015 09:00 AM Jury Trial, 04/01/2015 09:00 AM Jury Trial, 04/02/2015 09:00 AM Jury Trial, 04/03/2015 09:00 AM Jury Trial, 04/06/2015 09:00 AM Jury Trial, 04/07/2015 09:00 AM Jury Trial, 04/08/2015 09:00 AM Jury Trial, 04/09/2015 09:00 AM Jury Trial, 04/10/2015 09:00 AM Jury Trial, 04/13/2015 09:00 AM Jury Trial, 04/14/2015 09:00 AM Jury Trial, 04/15/2015 09:00 AM Jury Trial	351
05/01/2015	Court Reporter Marilyn Silvia is hereby notified to prepare one copy of the transcript of the evidence of 03/24/2015 09:00 AM Jury Trial	351.1
05/01/2015	General correspondence regarding transcripts ordered for appeal sent to counsel	352
05/01/2015	Rescript received from Supreme Judicial Court; judgment AFFIRMED (SJ-2015-0088).	353
05/01/2015	CD of Transcript of 03/24/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	354
05/01/2015	CD of Transcript of 01/16/2015 08:30 AM Jury Trial received from Court Reporter Lori Saulnier.	355
05/01/2015	CD of Transcript of 04/01/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	356
05/04/2015	CD of Transcript of 06/16/2014 09:00 AM Pre-Trial Hearing received from Court Reporter Karoline Crawford.	357
05/12/2015	Exhibits Returned to State Police #124, #184, #185, and #JJ	358
05/12/2015	Aaron J Hernandez's Memorandum in support of Defendant's Renewal of Motion for Required Finding of Not Guilty on Counts One and Two or for Other Relief	359
05/12/2015	Exhibits Returned to the North Attleboro Police Department (exhibit #95)	360
05/12/2015	Endorsement on Motion for required finding of not guilty on counts 1 and 2 or for other relief, (#341.0): Other action taken The Commonwealth has thirty (30) days to file its response.	
05/12/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq.	

Docket Date	Docket Text	File Ref Nbr.
	Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq.	
05/14/2015	Court Reporter Karoline Crawford is hereby notified to prepare one copy of the transcript of the evidence of 10/30/2014 12:15 PM Motion Hearing	361
05/14/2015	Court Reporter Lori Saulnier is hereby notified to prepare one copy of the transcript of the evidence of 03/19/2015 09:00 AM Jury Trial	362
05/29/2015	Defendant 's Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal	363
05/29/2015	Defendant 's Motion for Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues	364
05/29/2015	Affidavit filed by Defendant Aaron J Hernandez in support of Motion for Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues	365
05/29/2015	Aaron J Hernandez's Memorandum in support of Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues	366
05/29/2015	Defendant 's Motion to Authorize Issuance of Subpoena to Ascertain Source of Information Provided to Counsel	367
06/03/2015	Endorsement on Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal, (#363.0): Other action taken The pleadings, except for the instant motion, are impounded ex parte, pending a hearing on the defendant's Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal. That Motion is not impounded. A hearing on the defendant's Motion for Leave to Impound will be held on June 12, 2015 at 9:00 AM. Any opposition to the motion by the Commonwealth or by any interested third person shall be served and filed no later than June 10, 2015.	
06/03/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq.	
06/03/2015	CD of Transcript of 09/30/2014 09:00 AM Motion Hearing, 10/01/2014 09:00 AM Motion Hearing, 10/02/2014 09:00 AM Motion Hearing received from Court Reporter Linda L.Kelly.	368
06/08/2015	Other 's Motion to Intervene for the Limited Purpose of Unsealing Certain Post-Trial Motions (GateHouse Media, LLC); Memorandum of Law in Support; Affidavit of E. Hannigan; Affidavit of B. Fraga	371
06/11/2015	Opposition to paper #363.0 Defendant's Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal filed by Commonwealth	372
06/12/2015	Opposition to paper #341.0 Defendant's Renewed Motion for a Required Finding of Not Guilty filed by Commonwealth	373
06/12/2015	Event Result: The following event: Motion Hearing scheduled for 06/12/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:	
06/15/2015	Aaron J Hernandez's Memorandum in support of Motion to Impound Specific Post-Verdict Pleadings and Response to GateHouse Media LLC's "Motion to Intervene for the Limited Purpose of unsealing Certain Post-Trial Motions	373.1
06/15/2015	MEMORANDUM & ORDER:	374

Docket Date	Docket Text	File Ref Nbr.
	on Defendant's Motion to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound): . . . For the foregoing reasons, it is hereby ORDERED that the Defendant's Motion to Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound) be ALLOWED in part and DENIED in part and that GateHouse Media LLC's Request to unseal and grant immediate access to the pleadings respecting post-verdict inquire be DENIED.	
06/15/2015	Defendant 's Motion for Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (REDACTED)	375
06/15/2015	Affidavit of James L Sultan In Support of Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (REDACTED)	376
06/15/2015	Aaron J Hernandez's Memorandum in support of Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (REDACTED)	377
06/15/2015	Defendant 's Motion of Authorize Issuance of Subpoena to Ascertain Source of Information Provided to Counsel (REDACTED)	378
06/15/2015	CD of Transcript of 08/11/2014 09:00 AM Motion Hearing received from Court Reporter Ann Marie McDonald.	379
06/22/2015	Aaron J Hernandez's Reply Memorandum to Commonwealth's Opposition to Defendant's Renewed Motion for a Required Finding of Not Guilty	380
06/22/2015	ORDER: Both the Commonwealth and the defendant (and their respective agents) are prohibited from having any direct or indirect contact with the juror identified in docket #365 until further order of the Court.	381
06/25/2015	Endorsement on Motion for Required Finding of Not Guilty on Counts 1 and 2 or for other Relief, (#341.0): DENIED After review, the defendant's Renewed Required Finding of Not Guilty on Counts 1 and 2 or for Other Relief is DENIED. Considering the evidence in light most favorable to the Commonwealth, the court finds that a rational jury could find that the Commonwealth proved every essential element of the crimes charged in counts 1 and 2 beyond a reasonable doubt. The jury's verdict that the defendant is guilty of murder in the first degree committed with extreme atrocity or cruelty and that he is guilty of unlawful possession of a firearm is supported by the evidence. Further, with respect to the murder charge, the court declines to exercise its discretion, pursuant to Mass. Rules Crim. P. 25(b)(2), to order the entry of a finding of guilty to murder in the second degree. The verdict rendered by the jury is consonant with justice.	
06/30/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
06/30/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq.	

Docket Date	Docket Text	File Ref Nbr.
	Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
07/02/2015	Opposition to paper #378.0 Defendant's Motion to Authorize Issuance of Subpoena filed by (impounded pursuant to Court ofder of June 15, 2015 with redacted copy publicly available.	382
07/02/2015	Commonwealth 's Motion for Post-Verdict Discovery; Affidavit of R.L. Michel, Jr.	383
07/03/2015	Opposition to paper #378.0 Defendant's Motion to Authorize Issuance of Subpoena filed by (REDACTED)	384
07/03/2015	MEMORANDUM & ORDER: on Defendant 's Motion to Authorize Issuance of Subpoena to Ascertain Source of Information Provided to Counsel	385
07/03/2015	Endorsement on Motion for Motion for Post-Verdict Discovery, (#383.0): DENIED without prejudice. Access to the notes is unnecessary to respond to the request for a subpoena to issue seeking to disclose identity of informant. Should, after the name is disclosed, the defendant seek further action on his motion for post-verdict inquiry, the Court will permit the Commonwealth to renew its motion and seek a response from the defendant.	
07/03/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq.	
07/03/2015	ORDER: Impoundment Order	386
07/03/2015	CD of Transcript of 02/03/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	387
07/07/2015	CD of Transcript of 01/07/2015 09:00 AM Motion Hearing received from Court Reporter Lori Saulnier.	388
07/10/2015	CD of Transcript of 10/08/2014 02:00 PM Evidentiary Hearing on Suppression received from Court Reporter Debra Keefer.	389
07/15/2015	CD of Transcript of 01/09/2015 09:00 AM Jury Trial, 01/12/2015 09:00 AM Jury Trial, 01/13/2015 09:00 AM Jury Trial, 04/10/2015 09:00 AM Jury Trial, 04/13/2015 09:00 AM Jury Trial, 04/14/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	390
07/16/2015	CD of Transcript of 04/15/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	391
07/21/2015	CD of Transcript of 01/29/2015 09:00 AM Jury Trial, 01/30/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	392
07/24/2015	CD of Transcript of 03/24/2015 09:00 AM Jury Trial received from Court Reporter Marilyn Silvia.	393
07/27/2015	Defendant 's Motion to Question Witness Under Oath	394
07/27/2015	Affidavit of James L. Sultan In Support of Defendant's Motion to Question Witness Under Oath (maintained under seal pursuant to the order dated 06/15/2015)	395
07/27/2015	Defendant 's Motion to Impoound Affidavit of James L. Sultan In Support of Defendant's Motion to Question Witness Under Oath	396
07/27/2015	Endorsement on Motion to Impound Affidavit of James L. Sultan In Support of Defendant's Motion to Questin Witness Under Oath, (#396.0): ALLOWED After review, for good cause, the defendant's motion to impound is ALLOWED. A redacted affidavit is to be made publicly available with the identity of the source kept private. The impoundment is narrowly tailored to prevent potential prejudice, and there are no reasonable alternatives to impoundment. See Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887-889 (1990) and this Court's Memorandum	

Docket Date	Docket Text	File Ref Nbr.
	of Decision and Order on Defendant's Motion to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound) dated June 15, 2015.	
07/27/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
07/27/2015	ORDER: Commonwealth is to respond to the Defendant's Motion to Question Witness Under Oath by 7/31/2015	
07/27/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Keeper of Record: WBZ-TV Keeper of Record: WCVB-TV Keeper of Record: WHDH-TV Keeper of Record: WFXT-TV Keeper of Record: NECN-TV Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Holding Institution: MCI - Cedar Junction (at Walpole) Attorney: Michael C Bourbeau, Esq. Holding Institution: Souza Baranowski Correctional Center Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
07/27/2015	Affidavit of James L. Sultan in Support of Defendant's Motion to Question Witness Under Oath (REDACTED)	395.1
07/28/2015	CD of Transcript of 04/08/2015 09:00 AM Jury Trial, 04/09/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	397
08/03/2015	Opposition to paper #394.0 Defendant's Motion to Question Witness Under Oath filed by Commonwealth (filed under Seal and maintained under Seal pursuant to G.L. c268 s13D(e)	398
08/03/2015	Opposition to paper #394.0 Defendant's Motion to Question Witness Under Oath (REDACTED) filed by Commonwealth	398.1
08/03/2015	Endorsement on Motion to Question Witness Under Oath, (#394.0): DENIED without prejudice to renew with an affidavit from the source. As stated in the Memorandum of Decision and Order on Defendant's Motion to Authorize Issuance of a Subpoena, that motion was allowed to give the defendant the opportunity to file a supplemental affidavit executed by the caller. Questioning the caller under oath may very well be warranted to assess the credibility of the caller, but it is premature.	
08/03/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Patrick Otto Bomberg, Esq.	

Docket Date	Docket Text	File Ref Nbr.
	Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq.	
08/06/2015	CD of Transcript of 02/04/2015 09:00 AM Jury Trial, 02/05/2015 09:00 AM Jury Trial, 02/06/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	399
08/07/2015	Defendant 's Motion to Question Witness Under Oath (Renewed)	401
08/07/2015	Defendant 's Motion to Impound Affidavit of James L. Sultan in Support of Defendant's Renewed Motion to Question Witness Under Oath	402
08/07/2015	Endorsement on Motion to Impound Affidavit of James L. Sultan in Support of Defendant's Renewed Motion to Question Witness Under Oath, (#402.0): ALLOWED After review, for good cause, the defendant's motion to impound is ALLOWED. A redacted affidavit is to be made publicly available. The impoundment is narrowly tailored to prevent potential prejudice, and there are no reasonable alternatives to impoundment. See Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887-889 (1990) and this Court's Memorandum of Decision and Order on Defendant's Motion to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound) dated July 15, 2015. This impoundment order, like the others relating to the issue of a juror having been exposed to extraneous information, will be lifted should the court ultimately deny the defendant's motion to proceed to a formal hering at which the juror at issue is interrogated or, if there is to be such a hearing, at the conclusion of the evidentiary portion of the hearing.	
08/07/2015	Affidavit filed by Defendant Aaron J Hernandez in support of Defendant's Renewed Motion to Question Witness Under Oath (maintained under seal pursuant to the court's order of 06/15/2015)	403
08/07/2015	Affidavit filed by Defendant Aaron J Hernandez in support of Defendant's Renewed Motion to Question Witness Under Oath (REDACTED)	403.1
08/07/2015	Endorsement on Motion to Motion to Question Witness Under Oath (Renewed), (#401.0): Other action taken The Commonwealth is ordered to file its opposition if any by August 12, 2015.	
08/10/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq.	
08/10/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq.	
08/12/2015	Opposition to paper #401.0 Defendant's Renewed Motion to Question Witness Under Oath filed by Commonwealth	403.2
08/12/2015	Opposition to paper #401.0 Defendant's Renewed Motion to Question Witness Under Oath (REDACTED) filed by Commonwealth A redacted copy of the pleading is to be made publicly available. The redactions are narrowly tailored to prevent potential prejudice, and there are no reasonable alternatives to redaction. See Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887-889 (1990) and this Court's Memorandum of Decision and Order on Defendant's Motion to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound) dated July 15, 2015. This redaction order, like the others relating to the issue	403.3

Docket Date	Docket Text	File Ref Nbr.
	of a juror having been exposed to extraneous information, will be lifted should the court ultimately deny the defendant's motion to proceed to a formal hearing at which the juror at issue is interrogated or, if there is to be such a hearing, at the conclusion of the evidentiary portion of the hearing.	
08/13/2015	CD of Transcript of 02/11/2015 09:00 AM Jury Trial, 02/18/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	404
08/17/2015	Defendant Aaron J Hernandez files Reply to to Commonwealth's Opposition to Defendant's Renewed Motion to Question Witness Under Oath (#401.0)	405
08/18/2015	Memorandum of Decision and Order on Defendant's Renewed Motion to Question Witness Under Oath	406
08/24/2015	Defendant 's Motion to Postpone Deadlines Regarding Caller By Two Weeks	407
08/28/2015	CD of Transcript of 02/13/2015 09:00 AM Jury Trial, 02/17/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	408
09/18/2015	CD of Transcript of 02/19/2015 09:00 AM Jury Trial, 02/26/2015 09:00 AM Jury Trial, 02/27/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	409
09/23/2015	Defendant 's Motion to Authorize Issuance of Subpoena to Identify Subscriber of Internet Protocol Address; Affidavit of C.W. Rankin in Support	410
09/23/2015	Commonwealth 's Motion for Discovery (Second) (impounded pursuant to the Court's order of 06/15/2015)	411
09/23/2015	Commonwealth 's Motion for Discovery (Second) REDACTED	411.1
09/24/2015	CD of Transcript of 03/05/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	412
09/25/2015	Opposition to paper #411.0 Second Motion for Discovery filed by Aaron J Hernandez	413
09/25/2015	Opposition to paper #411.1 Second Motion for Discovery filed by Aaron J Hernandez REDACTED	413.1
09/25/2015	Opposition to paper #410.0 Motion to Authorize Issuance of Subpoena to Identify Subscriber of Internet Protocol Address filed by Commonwealth	414
09/26/2015	Defendant 's Motion for Leave to File Exhibit 3 Under Seal	415
09/25/2015	General correspondence regarding Exhibit 3 of Defendant's Motion for Leave to File Exhibit 3 Under Seal. Filed and maintained under SEAL pursuant to the Court's order dated 06/15/2015.	416
09/25/2015	ORDER: on Defendant's Motion for Leave to File Exhibit 3 Under Seal – Treating this motion as a motion to impound, the motion is ALLOWED. The impoundment is narrowly tailored to prevent potential prejudice, and there are no reasonable alternatives to impoundment. See Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887-889 (1990) and this Court's Memorandum of Decision and Order on Defendant's Motion to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal (Motion to Impound) dated July 15, 2015. This impoundment order, like the others relating to the issue of a juror having been exposed to extraneous information, will be lifted should the court ultimately deny the defendant's motion to proceed to a formal hearing at which the juror at issue is interrogated or, if there is to be such a hearing, at the conclusion of the evidentiary portion of the hearing.	417
09/25/2015	Event Result: The following event: Hearing RE: Discovery Motion(s) scheduled for 09/25/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Attorney McCauley, Esq., William M Attorney Griffin, Esq., Brian D Attorney Rankin, Esq., Charles Wesley Attorney Sultan, Esq., James L	
09/25/2015	Endorsement on Motion to Motion to Authorize Issuance of Subpoena to Identify Subscriber of Internet Protocol Address; Affidavit of C.W. Rankin in Support, (#410.0): DENIED After review and hearing, Defendant's Motion to Authorize Issuance of Subpoena to Identify Subscriber of Internet Protocol Address is DENIED. Apart from the fact that the survey, which can be completed by anybody regardless of whether he or she actually served on a jury, was completed by someone using a Utah-based internet service provider, the defendant not shown that an allegation that jurors may have talked amongst themselves during the trial merits inquiry. See Commonwealth v. Mahoney, 406 Mass.	

Docket Date	Docket Text	File Ref Nbr.
	843, 856 (1990) ("any disregard by jurors of instructions from the judge not to discuss the case prior to deliberations would not provide a basis to conclude that the verdicts were tainted, in the absence of any concrete facts that the discussions involved matters not in evidence"); Commonwealth v. Scanlan, 9 Mass. App. Ct. 173, 184 (1980) (claim that jurors discussed case with each other in violation of judge's daily instructions does not raise an issue of extraneous influence but, rather, is a matter involving the internal decision making process of the jury, on which the court should not hear testimony). Cf. Commonwealth v. Avalos, 2014 WL 1302046 at * (Mass. App. Ct. Rule 1:28) (discussion of case by two jurors during cigarette break after deliberations commenced does not raise issue of extraneous influence; while undesirable, such discussion does not impeach a verdict unless there is actually extraneous evidence involved.	
09/25/2015	Endorsement on Motion for Discovery (Second), (#411.1): DENIED DENIED after hearing. See Ruling on the record.	
09/25/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Keeper of Record: WBZ-TV Keeper of Record: WCVB-TV Keeper of Record: WHDH-TV Keeper of Record: WFXT-TV Keeper of Record: NECN-TV Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Holding Institution: MCI - Cedar Junction (at Walpole) Attorney: Michael C Bourbeau, Esq. Holding Institution: Souza Baranowski Correctional Center Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
09/25/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
09/25/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	

Docket Date	Docket Text	File Ref Nbr.
10/19/2015	The following form was generated: Summons to Appear (Witness) Sent On: 10/19/2015 11:51:03	418
10/20/2015	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 10/23/2015 02:00 PM Motion Hearing. (confirmed w/Miriam)	419
10/21/2015	Summons returned to court: SERVED	
10/23/2015	Event Result: The following event: Motion Hearing scheduled for 10/23/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled	
11/16/2015	Defendant 's Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal	420
11/16/2015	Endorsement on Motion for Leave to File Accompanying Pleadings Respecting Post-Verdict Inquiry Under Seal, (#420.0): No Action Taken If Defendant wishes to file pleadings "under seal" he should comply with the Uniform Rules on Impoundment Procedure, as amended, effective 10/1/2015. Trial Court Rule 8.	
11/16/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
11/25/2015	CD of Transcript of 02/25/2015 09:00 AM Jury Trial, 03/25/2015 09:00 AM Motion Hearing received from Court Reporter Lori Saulnier.	421
12/02/2015	The following form was generated: Notice to Appear Sent On: 12/02/2015 15:26:23	
12/04/2015	Defendant 's Motion to Impound Portions of Motion and Memorandum Respecting Post-Verdict Inquiry; Affidavit of Charles W. Rankin In Support	422
12/09/2015	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 12/11/2015 03:00 PM Motion Hearing.	
12/10/2015	CD of Transcript of 02/24/2015 09:00 AM Jury Trial, 04/03/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	423
12/11/2015	Event Result: The following event: Motion Hearing scheduled for 12/11/2015 03:00 PM has been resulted as follows: Result: Held as Scheduled Appeared: Attorney McCauley, Esq., William M Attorney Bomberg, Esq., Patrick Otto Attorney Rankin, Esq., Charles Wesley Staff Appeared: Court Reporter Saulnier, Lori E.	
12/11/2015	Endorsement on Motion to impound portions of motion., (#422.0): ALLOWED Findings and order to be issued.	
12/14/2015		424

Docket Date	Docket Text	File Ref Nbr.
	MEMORANDUM & ORDER: For the foregoing reasons, it is hereby ORDERED that the Defendant's Motion to Impound Portions of Motion and Memorandum Respecting Post-Verdict Inquiry is ALLOWED. It is further ORDERED that the unredacted originals of the Defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues and Memorandum of Law in Support of Defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues be impounded when they are filed and not made available to the public and that redacted copies of those documents be placed in the public file. This order shall expire either when the Court decides that the defendant is not entitled to any further post-verdict inquiry or when a juror testifies at an evidentiary hearing.	
12/15/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
12/15/2015	CD of Transcript of 04/02/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	425
12/18/2015	Defendant 's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues	426
12/18/2015	Aaron J Hernandez's Memorandum in support of Defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues	427
12/18/2015	Defendant 's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (redacted)	426.1
12/18/2015	Aaron J Hernandez's Memorandum in support of Defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and Related Issues (redacted)	427.1
12/23/2015	Opposition to paper #426.0 Defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and related Issues. filed by Commonwealth	428
12/23/2015	Opposition to paper #426.0 Defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matter and related Issues. filed by Commonwealth (redacted) filed by Commonwealth	428.1
01/08/2016	Findings of Fact and Rulings of Law: and Order on Defendant's Motion for Further Post-Verdict Inquiry Repsecting a Juror's Exposure to Significant Extraneous Matter and Related Issues	429
01/08/2016	ORDER: dated 08/22/2015 (Paper #381) Is VACATED	430
01/11/2016	ORDER: Pursuant to the Order dated June 15, 2015, the following pleadings are no longer impounded: 364, 365, 366, 367, 382, 395, 403, 411, 413, 416, 418, 426, 427, 428. MAF	431
01/13/2016	Court Reporter Lori Saulnier is hereby notified to prepare one copy of the transcript of the evidence of 01/06/2015 09:00 AM Final Pre-Trial Conference (this day includes motions in limine)	432
01/13/2016	CD of Transcript of 03/03/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	433
01/15/2016	CD of Transcript of 01/06/2015 02:00 PM Conference to Review Status, 04/07/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	434
01/26/2016	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 02/03/2016 08:30 AM Status Review.	

Docket Date	Docket Text	File Ref Nbr.
02/03/2016	Event Result: The following event: Status Review scheduled for 02/03/2016 08:30 AM has been resulted as follows: Result: Held as Scheduled	
02/09/2016	Defendant 's Motion for appointment of counsel for purposes of appeal. Affidavit and supplimemtal affidavit attached under seal.	435
02/09/2016	Endorsement on Motion for Appointment of counsel for purposes of appeal, (#435.0): ALLOWED Referred to CPCS for appointment of counsel. The Court imposes a $150.00 legal counsel fee.	
02/10/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq.	
02/10/2016	General correspondence regarding Request for Assignment of Counsel on Appeal sent to CPCS.	436
02/11/2016	CD of Transcript of 03/06/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	437
02/17/2016	CD of Transcript of 02/20/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	438
02/19/2016	CD of Transcript of 03/13/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	439
02/29/2016	CD of Transcript of 02/23/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	440
03/07/2016	CD of Transcript of 03/27/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	443
03/24/2016	Attorney James L Sultan, Esq., Charles Wesley Rankin, Esq.'s motion to withdraw as counsel of record for party Applies To: Hernandez, Aaron J (Defendant)	444
03/24/2016	Endorsement on Motion to withdraw, (#444.0): ALLOWED	
03/25/2016	CD of Transcript of 03/30/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	445
03/29/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: John M Thompson, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Linda J Thompson, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq. Keeper of Record: WBZ-TV Keeper of Record: WCVB-TV Keeper of Record: WHDH-TV Keeper of Record: WFXT-TV Keeper of Record: NECN-TV Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C. Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Holding Institution: Souza Baranowski Correctional Center Attorney: Zachary Kleinsasser, Esq. Attorney: Emily C. Hannigan, Esq. Witness: Jessica Mendes	

Docket Date	Docket Text	File Ref Nbr.
03/29/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: James L Sultan, Esq. Attorney: John M Thompson, Esq. Attorney: Charles Wesley Rankin, Esq. Attorney: Linda J Thompson, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq. Attorney: William M McCauley, Esq.	
04/07/2016	Attorney Michael Kelley Fee, Esq.'s motion to withdraw as counsel of record for party Applies To: Hernandez, Aaron J (Defendant)	446
04/07/2016	Endorsement on Motion for leave to withdraw, (#446.0): DENIED Counts 3,4 and 5 remain open. Appellate counsel has not been appointed to try these indictments.	
04/08/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Brian D Griffin, Esq.	
04/27/2016	CD of Transcript of 03/18/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	447
05/12/2016	List of exhibits Amended List of Exhibits (with Ernest Wallace Exhibit Numbers in Italics)	448
05/24/2016	CD of Transcript of 03/19/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	449
06/20/2016	CD of Transcript of 03/31/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	450
06/28/2016	CD of Transcript of 03/02/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	451
07/06/2016	CD of Transcript of 03/11/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	452
07/06/2016	CD of Transcript of 04/06/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	453
07/12/2016	CD of Transcript of 03/04/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	454
07/12/2016	CD of Transcript of 03/23/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	455
08/02/2016	CD of Transcript of 03/09/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	456
08/02/2016	CD of Transcript of 03/26/2015 09:00 AM Jury Trial received from Court Reporter Lori Saulnier.	457
04/14/2017	Notice to counsel with transcript(s) (3/2/2015; 3/4/2015; 3/9/2015; 3/11/2015; 3/18/2015; 3/19/2015; 3/23/2015; 3/26/2015; 3/27/2015; 3/30/2015; 3/31/2015 and 4/6/2015)	458
04/18/2017	The following form was generated: Notice to Appear Sent On: 04/18/2017 12:52:51	
04/19/2017	Event Result: The following event: Status Review scheduled for 05/01/2017 02:00 PM has been resulted as follows: Result: Canceled Reason: By Court prior to date	
04/20/2017	CD of Transcript of 03/20/2015 09:00 AM Jury Trial received from Court Reporter, Lori Saulnier.	459
04/24/2017	Defendant 's Motion to Abate Prosecution and Notification of Death of Defendant-Appellant Aaron Hernandez	460
04/26/2017	ORDER: (see scanned document)	461

Docket Date	Docket Text	File Ref Nbr.
04/26/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: William M McCauley, Esq.	
05/01/2017	Commonwealth 's Motion In Opposition to Defendant's Motion to Abate Prosecution and Memorandum	462
05/04/2017	Defendant 's Reply to Commonwealth's Motion and Memorandum in Opposition to Defendant's Motion to Abate Prosecution Ab Initio	463
05/05/2017	Commonwealth 's Supplement to Motion and Memorandum in Opposition to Defendant's Motion to Abate Prosecution	464
05/08/2017	Defendant 's Motion to Strike Irrelevant Materials Submitted By the Commonwealth	465
05/09/2017	Event Result: The following event: Motion Hearing scheduled for 05/09/2017 10:00 AM has been resulted as follows: Result: Held as Scheduled Appeared: Attorney Thompson, Esq., Linda J Attorney Thompson, Esq., John M Attorney McCauley, Esq., William M Attorney Bomberg, Esq., Patrick Otto Staff Appeared: Court Reporter Saulnier, Lori E.	
05/09/2017	MEMORANDUM & ORDER: and Decision on Motion to Abate Prosecution: . . . For the foregoing reasons, it is ORDERED that the Motion to Abate Prosecution be and hereby is ALLOWED. It is further ORDERED that the murder, unlawful possession of a firearm, and unlawful possession of ammunition convictions be VACATED, that Indictments Nos. 2013-00983-1, 2 and 6 be DISMISSED, and that the Notice of Appeal be DISMISSED.	466
05/10/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Patrick Otto Bomberg, Esq.	
05/12/2017	Commonwealth 's Motion to Dismiss Untried Indictments Because of Suicide of Defendant	467
05/15/2017	Endorsement on Motion to Dismiss Untried indictments Because of Suicide of Defendant, (#467.0): ALLOWED	
05/15/2017	Disposed for statistical purposes	
05/16/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: William M McCauley, Esq.	
05/16/2017	Offense Disposition:: Charge #1 MURDER c265 §1 On: 04/15/2015 Judge: Hon. E. Susan Garsh By: Jury Trial Guilty Verdict Charge #2 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) On: 04/15/2015 By: Jury Trial Guilty Verdict Charge #3 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) On: 05/15/2017 Judge: Hon. E. Susan Garsh By: Other Court Event Dismissed - Defendant Deceased Charge #4 FIREARM, POSSESS LARGE CAPACITY c269 §10(m) On: 05/15/2017 Judge: Hon. E. Susan Garsh By: Other Court Event Dismissed - Defendant Deceased	

Docket Date	Docket Text	File Ref Nbr.
	Charge #5 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) On: 05/15/2017 Judge: Hon. E. Susan Garsh By: Other Court Event Dismissed - Defendant Deceased Charge #6 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) On: 04/15/2015 By: Jury Trial Guilty Verdict	
05/23/2017	Order for Transcript Cancelled by Supreme Judicial Court for event on 01/09/2015 09:00 AM Jury Trial and all other transcripts	
09/12/2017	Other 's Request to Bring a Camera Into the Courthouse to Photograph Color Documents	468
10/10/2017	Notice of docket entry received from Supreme Judicial Court	469
10/23/2017	Notice of docket entry received from Supreme Judicial Court (allowing the Commonwealth to Appeal the allowance of Defendant's Motion to Abate Prosecution)	470
10/24/2017	Notice of appeal filed. (regarding the allowance of Defendant's Motion to Abate Prosecution) Applies To: Commonwealth (Prosecutor); Bomberg, Esq., Patrick Otto (Attorney) on behalf of Commonwealth (Prosecutor); Michel, Jr., Esq., Roger Lee (Attorney) on behalf of Commonwealth (Prosecutor); McCauley, Esq., William M (Attorney) on behalf of Commonwealth (Prosecutor)	471
10/26/2017	Court Reporter Lori Saulnier is hereby notified to prepare one copy of the transcript of the evidence of 05/09/2017 10:00 AM Motion Hearing	472
10/26/2017	General correspondence regarding transcripts ordered for appeal sent to counsel	473
10/31/2017	Defendant 's Motion to Strike Commonwealth's Notice of Appeal	474
11/02/2017	Endorsement on Motion to Strike Commonwealth's Notice of Appeal, (#474.0): No Action Taken No action taken as defense counsel's authority to represent the defendant terminated on his death. Chandler v. Dunlop, 311 Mass. 1, 5 (1942) Judge: McGuire, Jr., Hon. Thomas F	
11/06/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
11/08/2017	General correspondence regarding Request from Renegade for exhibits	475
11/13/2017	General correspondence regarding notification from Norfolk Superior Court on telephone hearing with Garsh, J. attached to Clerk's Minutes and JAVS disc is in back of file	
11/29/2017	Defendant 's Motion to Reconsider Sua Sponte Order barring consideration of Motion to Strike Notice of Appeal and purporting to Disqualify Counsel and Memorandum in Support thereof	476
12/04/2017	ORDER: on Defense Counsel's Motion for Reconsideration: . . . Defense Counsel's motion for reconsideration is DENIED. Judge: McGuire, Jr., Hon. Thomas F	477
12/05/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
12/05/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Patrick Otto Bomberg, Esq.	

Docket Date	Docket Text	File Ref Nbr.
	Attorney: Roger Lee Michel, Jr., Esq. Attorney: William M McCauley, Esq.	
12/12/2017	CD of Transcript of 05/09/2017 10:00 AM Motion Hearing received from Lori Saulnier.	478
12/13/2017	Notice to counsel with transcript(s)	479
12/26/2017	General correspondence regarding thumb drive and receipt forwarded to H. Vair, CBS/48 Hours via FedEx	482
12/26/2017	Other Michael Kelley Fee, Esq., Laura Carey, Esq.'s Motion for Leave to Withdraw	483
01/02/2018	Endorsement on Motion to Withdraw, (#483.0): ALLOWED Judge: McGuire, Jr., Hon. Thomas F	
01/05/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: John M Thompson, Esq. Attorney: Linda J Thompson, Esq. Attorney: Michael Kelley Fee, Esq. Attorney: Laura Carey, Esq. Attorney: Patrick Otto Bomberg, Esq. Attorney: Roger Lee Michel, Jr., Esq. Attorney: Daniel L Goldberg, Esq. Attorney: Andrew C Phelan, Esq. Attorney: Michael C Bourbeau, Esq. Holding Institution: Souza Baranowski Correctional Center Attorney: Zachary Kleinsasser, Esq. Attorney: Emily Hannigan Bryan, Esq.	
01/11/2018	General correspondence regarding thumb drive and receipt forwarded to H. Vair, CBS/48 Hours via FedEx	484
01/17/2018	Appeal: Statement of the Case on Appeal (Cover Sheet). (regarding the allowance of Defendant's Motion to Abate Prosecution)	485
01/17/2018	Appeal: notice of assembly of record sent to Counsel	486
01/17/2018	Notice to Clerk of the Appeals Court of Assembly of Record	487
01/19/2018	MEMORANDUM & ORDER: of Decision on Reconsideration: In sum, in exercising my discretion as Single Justice, my original order setting this case on the normal course of appellate review was certainly not intended to preclude the Commonwealth from having appellate review altogether. My original ruling therefore stands. (Maura S. Doyle, Clerk) Judge: Unassigned	488
01/23/2018	Notice of docket entry received from Appeals Court Notice of Entry of Appeal received from the Appeals Court (2018-P-0087)	489
02/01/2018	Other 's Request for Permission to Use Footage	490
02/06/2018	Endorsement on Request for Permission to Use Footage, (#490.0): ALLOWED (AMS Pictures notified via email) Judge: McGuire, Jr., Hon. Thomas F	
02/07/2018	The following form was generated: A Clerk's Notice was generated and sent to: Other interested party: AMS Pictures	

Case Disposition

Disposition	Date	Case Judge

Disposition	Date	Case Judge
Dismissed	05/15/2017	

Supreme Judicial Court and Appeals Court of Massachusetts
Public Case Information

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SUPREME JUDICIAL COURT
for Suffolk County
Case Docket

COMMONWEALTH v. AARON HERNANDEZ
SJ-2017-0247

CASE HEADER

Case Status	Post Judgment Pleading Filed	**Status Date**	01/22/2018
Nature	Superintendence c 211 s 3	**Entry Date**	06/26/2017
Sub-Nature	Mot to Dismiss - Criminal	**Single Justice**	LO
TC Ruling	Motion allowed	**TC Ruling Date**	05/09/2017
SJ Ruling		**TC Number**	
Pet Role Below	Plaintiff in lower court	**Full Ct Number**	
Lower Court	Bristol Superior Court	**Lower Ct Judge**	Eleanor S. Garsh, J.

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Petitioner	David B. Mark, Assistant District Attorney
Aaron Hernandez Defendant/Respondent	John M. Thompson, Esquire Linda J. Thompson, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
06/26/2017		Case entered.
06/26/2017	#1	Petition For Relief Pursuant To G. L. c. 211, § 3 with Certificate of Service and Record Appendix filed by ADA David Mark.
07/03/2017	#2	Letter to Eric Wetzel, First Assistant Clerk from Atty. Linda J. Thompson saying..."In keeping with our telephone conversation this morning, I write to confirm that Mr. Hernandez's counsel will file a response to the Commonwealth's Petition for Relief Pursuant to G.L. c. 211, § 3 on or before July 31, 2017."
07/31/2017	#3	Letter to Eric Wetzel, First Assistant Clerk from Atty. John Thompson saying..."In keeping with our telephone conversation this morning, I write to

	DOCKET ENTRIES
	confirm that Mr. Hernandez's counsel will file a response to the Commonwealth's Petition for Relief Pursuant to G.L. c. 211, § 3 on or before September 1, 2017." filed.
09/01/2017 #4	Letter to Eric Wetzel, First Assistant Clerk from Atty. John Thompson saying..."In keeping with our telephone conversation this morning, I write to confirm that Mr. Hernandez's response to the Commonwealth's Petition for Relief Pursuant to G.L. c. 211, § 3 be extended to September 15, 2017." filed.
09/18/2017 #5	Opposition Of Respondent Aaron J. Hernandez To Commonwealth's Petition For Relief Pursuant To G. L. c. 211, § 3 with Certificate of Service filed by Atty. John Thompson.
09/21/2017	Under advisement. (Lowy, J.).
09/26/2017 #6	MOTION For Leave To File Amended And Substituted Opposition Of Aaron J. Hernandez To Commonwealth's Petition For Relief Pursuant To G. L. c. 211, § 3 with Certificate of Service filed by Atty. John Thompson. (9/28/17: "Per the within, Motion is ALLOWED WITHOUT HEARING". (Lowy, J.)).
09/26/2017 #7	Amended And Substituted Opposition Of Respondent Aaron J. Hernandez To Commonwealth's Petition For Relief Pursuant To G. L. c. 211, § 3 with Certificate of Service filed by Atty. Linda Thompson and Atty. John Thompson.
10/04/2017 #8	Notice to counsel/parties, regarding paper #6 filed.
10/20/2017 #9	JUDGMENT: ... "The petition is DENIED. The power under G. L. c. 211, § 3 is exercised only in exceptional circumstances and is not a substitute for normal appellate review. Planned Parenthood League v. Operation Rescue, 406 Mass. 701 (1990). The Commonwealth may appeal Judge Garsh's order in the normal course. Understanding that the normal period for filing a notice of appeal in the Superior Court has passed, the Commonwealth is granted leave to file their notice of appeal late, if filed no later than November 17, 2017. Should the case be appealed, this Court will give consideration to an application for direct appellate review." (Lowy, J.)
10/20/2017 #10	Notice to counsel/parties, regarding paper #9 filed.
10/30/2017 #11	Respondent's Motion for Reconsideration with Certificate of Service filed by Atty. Linda Thompson and Atty. John Thompson.
11/09/2017 #12	Commonwealth's Opposition to Motion for Reconsideration with Certificate of Service filed by A.D.A. Shoshana Stern.
11/09/2017	Under advisement. (Lowy, J.).

DOCKET ENTRIES		
01/16/2018	#13	Memorandum of Decision and Order on Reconsideration: "...In sum, in exercising my discretion as Single Justice, my original order setting this case on the normal course of appellate review was certainly not intended to preclude the Commonwealth from having appellate review altogether. My original ruling therefore stands." (Lowy, J.)
01/16/2018	#14	Notice to counsel/parties, regarding paper #13 filed.
01/22/2018	#15	Respondent's Request for Reciprocal Assistance of the Court with Attachments and Certificate of Service, filed by Atty. Linda Thompson and Atty. John Thompson.

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As of 01/22/2018 20:00

(2018-02-07 17:58:37)

#466.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
BRCR2013-00983

BRISTOL, SS SUPERIOR COURT
FILED
MAY 09 2017
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

COMMONWEALTH

vs.

AARON HERNANDEZ

MEMORANDUM OF DECISION AND ORDER ON MOTION TO ABATE PROSECUTION

On April 15, 2015, a jury convicted Hernandez of the first degree murder of Odin Lloyd and two firearms offenses. He filed a notice of appeal on April 21, 2015.[1] On April 19, 2017, Hernandez died at the Souza-Baranowski Correctional Center. His death certificate lists the cause of death as asphyxia by hanging and the manner of death as suicide. His appellate counsel now moves to abate the prosecution. The motion seeks that the appeal from the convictions be dismissed, that the convictions be vacated, and that the underlying indictments be dismissed. The Commonwealth opposes the motion to abate the convictions and dismiss the indictments; it does not object to dismissal of the appeal. For the reasons discussed below, the motion to abate is ALLOWED.

DISCUSSION

The long-standing practice in Massachusetts is that if a defendant dies while his conviction is on direct appeal, the conviction is vacated and the indictment dismissed, thus abating the entire prosecution as if it never happened. Commonwealth v. Squires, 476 Mass. 703, 707 (2017); Commonwealth v. Harris, 379 Mass. 917, 917 (1980); Commonwealth v. Eisen, 368 Mass. 813, 813 (1975). See also Commonwealth v. De La Zerda, 416 Mass. 247, 248 (1993) (citing the many states

[1] The record has not yet been fully assembled and, accordingly, the appeal has not been docketed in the Supreme Judicial Court.

and federal courts that follow this practice).

The Commonwealth first argues that the abatement doctrine "lacks any identifiable historical or public policy basis." To the contrary, abatement has been practiced in federal and state courts for more than a century. See, e.g., List v. Pennsylvania, 131 U.S. 396, 396 (1888) (criminal cause abates upon the death of the accused); March v. State, 5 Tex. App. 450, 456 (1879) (when defendant dies while appeal is pending, prosecution abates in toto).

Moreover, the Supreme Judicial Court has explained that the primary policy served by abatement is the recognition that, because an appeal is an integral part of the system for fairly adjudicating guilt or innocence, the interests of justice do not permit a defendant to stand convicted without resolution of the merits of his appeal. De La Zerda, 416 Mass. at 251.[2] The direct appeal is moot because neither the asserted importance of the legal issues nor any personal interest in the defendant's vindication by counsel or the defendant's family is sufficient to warrant deciding the appeal of a dead person. Harris, 379 Mass. at 917; Eisen, 368 Mass. at 814. The policies supporting abatement apply in full force in this case, where Hernandez availed himself of the statutory right to appeal his convictions but died before his appeal was resolved. Cf. De La Zerda, 416 Mass. at 251 (allowing conviction to stand where, at time of his death, defendant had served his sentence and received direct appellate review of denial of his new trial motion, but Supreme Judicial Court had accepted his application for further discretionary review).

The Commonwealth is incorrect that the United States Supreme Court has rejected the practice of abatement. In *Durham* v. *United States*, the Supreme Court opined that the lower courts

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[2] In addition, abatement acknowledges the reality that post-conviction relief has become impossible because the defendant neither can be punished if the conviction stands nor retried if the conviction is reversed. De La Zerda, 416 Mass. at 250.

had adopted the "correct rule" that death pending direct review abates not only the appeal but the prosecution from its inception; the court then granted the defendant's pending petition for certiorari, vacated the judgment and remanded the case with an order to dismiss the indictment. 401 U.S. 481, 483 (1971). Five years later, the Supreme Court reversed *Durham* with respect to the disposition of an underlying judgment when a discretionary writ of certiorari is pending at the time of death. See Dove v. United States, 423 U.S. 325, 325 (1976) (where defendant dies while certiorari review is pending, Supreme Court will simply dismiss the petition for certiorari, allowing conviction to stand). Nothing in the two-sentence *per curiam* decision in *Dove* suggests that the Supreme Court has rejected the policy of abatement when a defendant dies during his direct appeal. See United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994) (recognizing that Supreme Court has adopted abatement policy abating not only appeal but prosecution from its inception in cases of death pending direct review as have the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).[3] See, e.g., United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) (interpreting *Dove* as applying only to certiorari petitions, not appeals as of right); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (*Dove* does not change longstanding abatement practice as applied to appeal as of right); United States v. Bechtel, 547 F.2d 1379, 1380 (9th Cir. 1977) (*Dove* controls only disposition of certiorari petitions, not direct review of conviction). See also De La Zerda, 416 Mass. at 249 (citing *Dove* for proposition that, when a defendant dies after filing a certiorari petition, the Supreme Court dismisses the petition but leaves underlying judgment untouched). Even though

[3] Each of the Circuit Court decisions cited in *Pogue* were decided after *Dove*. Moreover, after *Pogue* was decided, the Third Circuit also adopted the abatement practice. See United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001). In addition, the First Circuit follows this practice. See United States v. Sheehan, 874 F.Supp. 31, 33 (D. Mass. 1994).

the Commonwealth is mistaken about the import of *Dove*, the point is not critical because *Dove* does not control how Massachusetts handles cases pending on direct appeal after the death of the defendant.

The Commonwealth further argues that this Court should follow an emerging trend in other states to reject abatement based on the need to respect jury verdicts and protect the rights of victims and their families. See, e.g., State v. Korsen, 111 P.3d 130, 134-135 (Idaho 2005) (rejecting abatement on public policy grounds because it denies victims fairness, respect, dignity and closure by preventing finality of the conviction); Surland v. State, 895 A.2d 1034, 1039-1044 (Md. 2006) (rejecting abatement because conviction erases presumption of innocence, state has interest in preserving presumptively valid conviction, and abatement has collateral consequences for defendant's estate and victims, but allowing estate to elect whether to pursue appeal); State v. Devin, 142 P.3d 599, 605-606 (Wash. 2006) (rejecting abatement because it deprives victims of compensation required by law and has collateral consequences such as emotional distress, lessened ability to recover civil judgment, and potential impacts on family court proceedings, but courts not precluded from deciding a criminal appeal on the merits post-death if "doing so is warranted"). In support of its argument, the Commonwealth invokes G.L. c. 258B, § 3, "Rights of Victims and Witnesses of Crime," and 18 U.S.C. § 3771, "Crime Victims' Rights." While this Court recognizes the harsh emotional and legal effects of abatement on victims and their families, it is constrained to conclude that victims' rights statutes do not alter the longstanding and controlling practice of abatement of criminal proceedings. See People v. Robinson, 719 N.E.2d 662, 663-664 (Ill. 1999) (reversing lower court ruling that abatement does not apply in cases of violent crime based on need to protect victims).

Notably, the Supreme Judicial Court considered and explicitly rejected identical public policy arguments less than one year ago. In Commonwealth v. Keith Luke, the Commonwealth also argued that the abatement doctrine lacks a cogent rationale and urged the Supreme Judicial Court to follow the trend in other states of rejecting abatement in order to vindicate the rights of victims. See Commonwealth v. Keith Luke, SJC-11629, "Motion to Dismiss Appeal as Moot and Motion to Prevent or Forestall Abatement *Ab Initio* of the Underlying Convictions" (May 29, 2014).[4] In its brief in the *Luke* case, the Commonwealth relied on much of the same case law and statutes cited by the Commonwealth in this matter. In an order dated July 21, 2016, the Supreme Judicial Court vacated Luke's murder, rape, kidnaping, home invasion, armed assault, and firearms convictions and remanded the case for entry of an order dismissing the indictments, stating: "[n]othing in the Commonwealth's submission persuades us to change our longstanding practice in these circumstances." Commonwealth v. Keith Luke, SJC-11629 (July 21, 2016). Thus, the Supreme Judicial Court rejected the precise argument made to this court that public policy concerns warrant abandonment of the traditional abatement practice. See also Squires, 476 Mass. at 707 (recently affirming vitality of general practice of abatement). Abatement remains the law in this Commonwealth, and this Court is compelled to follow binding precedent. See Commonwealth v. Vasquez, 456 Mass. 350, 356 (2010) (decisions of Supreme Judicial Court on all questions of law are conclusive on trial courts).

Notwithstanding the general practice of abatement, the Supreme Judicial Court has noted that, in a particular case, "the interests of justice" may merit a departure from abatement *ab initio*. See Squires, 476 Mass. at 707 (fairness dictated that decedent should have same outcome as co-

[4] The Commonwealth did not bring the *Luke* appeal to the attention of this Court.

defendant where co-defendant had incorporated by reference arguments made by decedent, thus requiring SJC to address decedent's arguments on the merits despite his death). The Commonwealth argues that waiver and forfeiture principles warrant an exception to abatement when the defendant commits suicide.[5]

Waiver is the intentional and voluntary relinquishment of a known statutory or constitutional right, which can be inferred from a person's words and conduct under all the circumstances. Merrimack Mut. Fire Ins. Co. v. Nonaka, 414 Mass. 187, 189-190 (1993); Commonwealth v. Scionti, 81 Mass App. Ct. 266, 278, rev. den., 461 Mass. 1111 (2012).[6]

The doctrine of forfeiture by wrongdoing is based on the principle that a defendant should not be permitted to gain a tactical advantage from his own wrong. Commonwealth v. Szerlong, 457 Mass. 858, 861 (2010), cert. den., 562 U.S. 1230 (2011); Commonwealth v. Sousa, 2016 WL 4006250 at *1 (Mass. App. Ct. Rule 1:28), rev. den., 475 Mass. 1105 (2016). For example, a defendant forfeits his right to cross-examine a witness if the defendant is involved in or responsible

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[5] In contrast to the argument that the abatement practice should be abandoned, this Court does have authority to consider the Commonwealth's alternative arguments that suicide or lack of probability of success on the merits warrant departures from the abatement doctrine in the "interests of justice." The Court disagrees with the argument of defense counsel that the values that inform the "interests of justice" calculus have already been "categorically settled" by the SJC. There is no indication in the case law or reason to assume that, given a sufficiently persuasive reason, an additional ground or grounds to depart from the general practice could not be found to be in the interests of justice. See also Eisen, 368 Mass. at 313 (when a defendant dies pending his appeal, "normally" the judgment should be vacated and the indictment dismissed). The arguments made by the Commonwealth here, other than with respect to outright abrogation of the abatement *ab initio* practice, do not appear ever to have been made to the SJC.

[6] See also Commonwealth v. Means, 454 Mass. 81, 89 (2009) (waiver of right to counsel must be voluntary and informed); Commonwealth v. Tavares, 385 Mass. 140, 144-145 (1982) (waiver of *Miranda* rights must be knowing and voluntary); Ciummei v. Commonwealth, 378 Mass. 504, 507 (1979) (waiver of right to jury trial must be freely and knowingly given).

for procuring the unavailability of the witness and acted with the intent to make the witness unavailable. Szerlong, 457 Mass. at 861. Forfeiture by wrongdoing requires a specific intent by the defendant to interfere with the course of justice. See Commonwealth v. Edwards, 444 Mass. 526, 536, 542, 549 (2005); Scionti, 81 Mass App. Ct. at 278.

The Commonwealth maintains that Hernandez's deliberate, voluntary, and affirmative act of ending his own life manifests an intention to abandon his appeal and thus amounts to a waiver of his right to review or a forfeiture of any claim for abatement of his convictions. See United States v. Dwyer, 654 F. Supp. 1254, 1255 (M.D. Pa. 1987) (suicide presents exception to general practice of abatement, at least where defendant committed suicide before sentencing, it was possible that defendant would have chosen not to appeal given his suicide statement that he had no faith in the judicial system and his statement that he did not believe he could succeed in reversing the verdict upon appeal, it was highly unlikely he would have succeeded on appeal, and "it defies common sense to allow [defendant] to be absolved of criminal liability so carefully arrived at by a jury because he intentionally took his own life before the appeal process could run"), vacated by United States v. Dwyer, 855 F.2d 144 (3d Cir. 1988) (dismissing case on standing grounds).[7]

This Court cannot know why Hernandez may have chosen to end his life and declines to infer an intent by Hernandez to relinquish his appellate rights or an intent to interfere with the course of justice from his reported suicide, a tragic act that may have complex and myriad causes. See

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[7] Although the Commonwealth also cites State v. McDonald, 405 N.W.2d 771,772 (Wis. App. Ct. 1987) for the proposition that suicide justifies an exception to abatement, that case was overruled by the Wisconsin Supreme Court. See State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988) (holding that all appeals continue after death and declining to distinguish between suicide and natural causes because the court should not have to inquire in each case into the circumstances of defendant's death).

People v. Robinson, 699 N.E.2d 1086, 1095 (Ill. App. Ct. 1998) (Greiman, J., dissenting in part) ("the notion of whether the act of suicide changes the effect of [abatement] because it is a 'waiver' or an escape is too metaphysical to address . . . "), rev'd, People v. Robinson, 719 N.E.2d 662 (Ill. 1999). The Commonwealth's supplemental filing, based in large part upon statements from unnamed inmates, suggests several possible motives for suicide that are unrelated to the defendant's appeal. Particularly telling is the fact that, according to the Department of Correction's investigatory report, inmates were aware of, and some viewed as disrespectful, a radio broadcast that "brought up that Hernandez was gay. " The report also states that, according to other inmates, Hernandez had become increasingly spiritual while in prison, and they viewed his suicide as some sort of religious message. One inmate stated that Hernandez frequently talked with a religious tone and expressed his belief that, when you die, your soul gets reincarnated. A religious motive and possibly mental disturbance is reflected in the note Hernandez allegedly left for his fiancee, in which he wrote, "This was the Supremes, the almightys plan, not mine!" The report states that an inmate, who claimed to be one of Hernandez's best friends, said that, after the verdict in the other case, Hernandez had been talking about the NFL and going back to play "even if it wasn't with the Pats," statements that do not reflect the mind-set of a defendant who intended to waive his right of appeal. While the report does state that Hernandez had recently mentioned to one inmate a rumor that if an inmate has an open appeal and dies in prison, he is acquitted of the charge and deemed not guilty, there is no indication that he had been so advised by any attorney. The defendant's arguable awareness of such a rumor hardly is sufficient to warrant the inferences the Commonwealth seeks to draw with respect to the defendant's specific intent.

The case of United States v. Chin, 633 F. Supp. 624, 627-628 (E.D. Va. 1986), rev'd on other

grounds, 848 F.2d 55 (4th Cir. 1988), is not, in fact, based on "all of the same factors" that are present here, as the Commonwealth asserts. The District Court in *Chin* did not rely merely on the defendant's suicide in carving out an exception to abatement. Rather, there was nothing in the record of that case that supported a conclusion that counsel for the defendant had either been requested or authorized to take an appeal. The defendant committed suicide before judgment entered. Further, the record justified a conclusion that the defendant did not intend to appeal because he wrote to his wife that he had decided not to appeal and that his decision had made him feel "extremely tranquil." 633 F. Supp. at 627-628.

Given the mental health implications of the act of suicide, where, as here, a defendant has filed a Notice of Appeal, it would not be in the interests of justice to depart from the practice of abatement because the death may have been by suicide. A defendant may lack the capacity to make a voluntary choice whether or not to live. In many cases, circumstances such as mental illness, drug or alcohol use, or other impairment may negate an intentional and voluntary waiver of the right to appeal or an intent to frustrate justice. Cf. Commonwealth v. Bishop, 461 Mas. 586, 599-600 (2012) (mental illness, mental impairment, intoxication and consumption of drugs each may affect capacity to form specific intent); Commonwealth v. Gassett, 30 Mass. App. Ct. 57, 60 n. 1, rev. den., 409 Mass. 1104 (1991) (drugs, intoxication or mental impairment may negate defendant's ability to appreciate meaning and consequences of his own conduct). Therefore, an evidentiary inquiry would have to be held into the circumstances surrounding each defendant's purported suicide to attempt to determine if it actually was a suicide should that be contested,[8] if the defendant had the mental

[8] The death certificate, at best, is prima facie evidence of the cause of death. G.L. 46, § 19.

capacity to make a voluntary choice whether or not to live, and the factors or factor that motivated the suicide. If the decision "whether to abate a conviction *ab initio* [depends] upon whether the defendant died involuntarily or took his or her own life, we necessarily open the door to an exhaustive examination of the circumstances of death in most cases." State v. McDonald, 405 N.W.2d at 773-774 (Sundby, J. concurring). Neither public policy nor common sense supports such an evidentiary inquiry.

In the view of this Court, the waiver and forfeiture doctrines simply have no application to the issue of the abatement of a conviction. See People v. Matteson, 75 N.Y.2d 745, 747 (N.Y. 1989) (rejecting contention that suicide should be deemed a waiver or forfeiture of right to appeal); United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983) (rejecting argument that suicide is the "ultimate waiver"). The interests of justice do not warrant a departure from the doctrine of abatement because Hernandez may have committed suicide under the theory that suicide constitutes waiver of the right to appeal or the theory that suicide constitutes forfeiture by wrongdoing.

Finally, the Commonwealth argues that the interests of justice warrant not abating Hernandez's convictions because he had a negligible probability of success on appeal. See United States v. Dwyer, 654 F. Supp. at 1255 (declining to abate conviction of defendant who committed suicide, in part based on conclusion that there were no grounds whatsoever on which defendant could hope to succeed on appeal, and defendant stated he did not believe his conviction would be reversed); United States v. Chin, 633 F. Supp. at 628 (declining to abate conviction of defendant who committed suicide, in part based on court's determination that the record in the case did not reflect likely success on appeal where defendant took stand and completely confessed and, after consulting

with attorneys, decided that his appellate arguments were not strong).[9] None of the Massachusetts cases discussing abatement hint that the merits of the appeal might be a relevant factor. See De La Zerda, 416 Mass. at 251. In any event, the defendant in this case had not yet filed a motion for a new trial or appellate briefs before his death, and this Court cannot speculate as to the potential grounds he may have raised to challenge his convictions.

Our long-standing abatement doctrine requires that where, as here, the defendant is deprived of his statutory right of appeal due to death, whether by his own hand or otherwise, the interests of justice do not permit him to stand convicted because an appeal is integral to a fair adjudication of guilt or innocence. Accordingly, there being no reason to recognize an exception in this case in the interests of justice, this Court has no choice but to abate the proceedings in this case *ab initio* by vacating Hernandez's convictions and dismissing the charges against him and his appeal.

ORDER

For the foregoing reasons, it is **ORDERED** that the Motion To Abate Prosecution be and hereby is **ALLOWED**. It is further **ORDERED** that the murder, unlawful possession of a firearm, and unlawful possession of ammunition convictions be **VACATED**, that Indictments Nos. 2013-00983-1, 2, and 6 be **DISMISSED**, and that the Notice of Appeal be **DISMISSED**.

E. Susan Garsh
Justice of the Superior Court

DATED: May 9, 2017

[9]As noted supra, *Dwyer* was vacated and *Chin* was reversed on appeal.

Questioned
As of: February 8, 2018 8:48 PM Z

United States v. Parsons

United States Court of Appeals for the Fifth Circuit

April 16, 2004, Filed

No. 01-50464

Reporter
367 F.3d 409 *; 2004 U.S. App. LEXIS 7481 **

UNITED STATES OF AMERICA, Plaintiff-Appellee, VERSUS ANDREW CLYDE PARSONS, ESTATE OF, AS REPRESENTED BY ITS INDEPENDENT EXECUTOR, PATRICK D. MILLAR, Appellant.

Prior History: [**1] Appeal from the United States District Court for the Western District of Texas. No. W-99-CR-63-1. W-99-CR-63-1. Carl J Barbier, Trial Judge.

United States v. Estate of Parsons, 314 F.3d 745, 2002 U.S. App. LEXIS 25288 (5th Cir. Tex., 2002)

Disposition: Appeal dismissed, remanded with instructions to vacate.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Joseph A Florio, Joseph H Gay, Jr, Assistant US Attorney, US Attorney's Office, San Antonio, TX.

For ANDREW CLYDE PARSONS, Estate of, as Represented by its Independent Executor, Patrick D Millar, Appellant: Herbert V Larson, Jr, New Orleans, LA. David L Botsford, Law Office of David L Botsford, Austin, TX.

Judges: Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DEMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, and PRADO, Circuit Judges. * DENNIS, Circuit Judge, joined by HIGGINBOTHAM, DAVIS, WIENER, BENAVIDES, and STEWART, Circuit Judges, dissenting in part and specially concurring in part.

Opinion by: JERRY E. SMITH

Opinion

[*411] JERRY E. SMITH, Circuit Judge:

This case requires us to apply the doctrine of abatement *ab initio* to restitution and forfeiture orders where a criminal defendant dies while his appeal is pending. Concluding that, under the specific facts of this case, all conse quences of the untested criminal conviction should abate, we DISMISS the appeal and REMAND with direction to VACATE the judgment of conviction and sentence, including the order of restitution, and to dismiss the indictment. We do not, however, direct the government to return monies paid as part of this particular Preliminary Judgment of Forfeiture.

I.

After a second trial following a vacated conviction, a jury found Andrew Parsons guil ty of two counts of arson, four counts [**2] of mail fraud, and four counts of money laundering. Parsons allegedly set fire to his property and wrongfully received insurance proceeds to compensate for the loss. In addition to a ver dict of guilty, the jury returned a special forfeiture verdict. [1] The district court sentenced Parsons to seventy-eight months' imprisonment, a fine of $ 75,000, a special assessment of $ 1,000, restitution of $ 1,317,834.57 to the defrauded insurance companies, and three years' supervised release. [2]

* Judge Pickering was appointed to the court after this case was submitted, and he elected not to participate in the decision.

[1] Specifically, the jury found that Parsons had used $ 346,260 of the unlawfully-derived insur ance proceeds, as set forth in counts 1-5 of the in dictment, to construct a certain building and that he had unlawfully derived $ 970,826.90 from the offenses in counts 1-10.

[2] Although both parties state that the court is sued forfeiture orders originating from the jury's special forfeiture verdict, the order of judgment only lists the imprisonment, fine, and

[**3] Parsons then informed the government that he wished to sell the three tracts. The government approved the sale of those tracts for $ 1,900,000 under a contract [*412] that would provide cash at closing of $ 1,000,000. That sale was completed, and a check for $ 970,826.90 was given to the United States in return for a release of liens.

The sale in question was completed pursu ant to an agreement between Parsons and the United States. The government filed a motion describing the agreement. The motion states, in relevant part:

Because Defendant Parsons had no other apparent financial means with which to ful ly pay the Money Judgment in the amount of $ 970,826.90, the United States of America did not object to the . . . sale of [the three tracts], provided that a [government agent] be present at the real estate closing to receive a cashiers check . . . .

. . .

Further, inasmuch as this case remains on appeal at this time, the United States of America agrees that in the event Defendant Parsons prevails in the final determination of this appeal, and no final judgment of forfeiture is entered in this case, that the [government] should return to Defendant Parsons the entire amount of $ [**4] 970,826.90, plus interest . . . .

After the sale, the district court entered a Preliminary Judgment of Forfeiture of $ 970, 826.90, pursuant to FED. R. CRIM. P. 32.2(b). [3] The order states, in relevant part:

> ORDERED that inasmuch as this case re mains on appeal at this time, in the event Defendant Parsons prevails in the final de termination of this appeal, and no Final Judgment of Forfeiture is entered in this case, the [government] shall return to De fendant Parsons . . . the entire amount of $ 970,826.90, plus interest . . . .

[**5] While this appeal was pending, Parsons died. This court allowed his estate to substi tute itself for him as appellant, and the estate submitted a new appellate brief, arguing that Parsons's death abated the conviction, restitution order, and forfeiture orders. The estate also protected its interests by arguing, in the alternative, that if the restitution and forfeiture orders were not automatically abated by Parsons's death, the conviction should be re versed on grounds of violation of the Speedy Trial Act and inadequate nexus to interstate commerce.

A panel of this court upheld the restitution order and Preliminary Judgment of Forfeiture and rejected Parsons's other merits issues raised on appeal. United States v. Estate of Parsons, 314 F.3d 745, 750 (5th Cir. 2002), vacated for reh'g en banc, 333 F.3d 549 (5th Cir. 2003). Recognizing that it was bound by United States v. Asset, 990 F.2d 208 (5th Cir. 1993), and United States v. Mmahat, 106 F.3d 89 (5th Cir. 1997), the panel concluded that "because the restitution order here is unquestionably compensatory in nature, it survives Parsons's death." Parsons, 314 F.3d at 750. [**6] [4]

[*413] II.

Asset, *Mmahat*, and *Parsons* describe the current state of our abatement jurisprudence. HN1[↑] "It is well established in this circuit that the death of a criminal defendant pending an appeal of his or her case abates, *ab initio*, the en tire criminal proceeding." Asset, 990 F.2d at 210. [5] That is, the appeal does not just disappear, and the case is not merely dismissed. In stead, everything associated with the case is extinguished, leaving the defendant "as if he had never been indicted or convicted." Parsons, 314 F.3d at 749 (quoting United States v. Schumann, 861 F.2d 1234, 1237 (11th Cir. 1988)).

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restitution orders. Presumably, the restitution order incorporated the amounts listed in note 1, *supra*.

[3] At the sentencing hearing, the court indicated that the $ 1.317 million restitution order represent ed the full amount Parsons owed to his victims and that any sums recovered via forfeiture would apply against that total amount. Because Parsons did not tender any other monies to the govern ment, and because the district court did not enter any other temporary orders, no other portion of the restitution order is encompassed by the Tem porary Judgment of Forfeiture.

[4] The panel nonetheless questioned the correctness of those decisions. Parsons, 314 F.3d at 750. The panel further questioned the logic of our caselaw in referring to "the strange situation of our reviewing a criminal conviction in what has become a hypothetical case." Id. at 748.

[5] *See also* Mmahat, 106 F.3d at 93 ("Normally, the death of a criminal defendant during the pen dency of his appeal abates the entire proceeding *ab initio*."); United States v. Schuster, 778 F.2d 1132, 1133 (5th Cir. 1985) ("Under the firmly es tablished rule in this circuit, the death of a defen dant pending conclusion of the direct criminal ap peal abates, *ab initio*, not only the appeal, but the entire criminal proceeding.").

[**7] HN2[↑] With respect to restitution, we have looked to the purpose of the order to determine whether it abates with the conviction. "When restitution is ordered simply to punish the de fendant, it is penal and abates with the rest of his conviction. When it is designed to make his victims whole, however, it is compensatory and survives his death." Mmahat, 106 F.3d at 93. Additionally, abatement does not entitle a defendant to monies paid before death as part of a fine or restitution order. [6]

III.

HN3[↑] Despite the common acknowledgment that abatement *ab initio* is a well-established and oft-followed principle in the federal courts, [7] few courts have plainly articulated the ration ale behind the doctrine. Two primary ap proaches support abatement *ab initio* [**8] . The fi nality principle reasons that the state should not label one as guilty until he has exhausted his opportunity to appeal. The punishment principle asserts that the state should not pun ish a dead person or his estate. Although the finality principle best explains why criminal proceedings abate at death, finality does not justify the distinction between compensatory and penal restitution orders.

[**9] HN4[↑] Under the finality rationale, we have de scribed the entitlement to one appeal as follows:

> When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the *[*414] interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal*, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."

United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) (emphasis added, brackets in original) (quoting Griffin v. Illinois, 351 U.S. 12, 18, 100 L. Ed. 891, 76 S. Ct. 585 (1956)). [8] [**10] The defendant's attack on his conviction tests previously unforeseen weaknesses in the state's case or outright errors at trial. [9] Under this rationale, neither the state nor affected parties should enjoy the fruits of an untested conviction.

The second rationale focuses on the precept that the criminal justice system exists primarily to punish and cannot effectively punish one who has died. "The purposes of criminal proceedings are primarily penal–the indictment, conviction and sentence are charges against and punishment of the defen dant–such that the death of the defendant eliminates that purpose." [10] The government and other circuits have mentioned this justification. [11]

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[6] See, e.g., United States v. Zizzo, 120 F.3d 1338, 1347 (7th Cir. 1997) (regarding fines and forfeitures); Asset, 990 F.2d at 214 (regarding restitution); Schumann, 861 F.2d at 1236.

[7] In applying Durham v. United States, 401 U.S. 481, 483, 28 L. Ed. 2d 200, 91 S. Ct. 858 (1971) (per curiam) (stating that "death pending direct review of a criminal con viction abates not only the appeal but also all pro ceedings had in the prosecution from its incep tion"), *overruled on other grounds*, Dove v. United States, 423 U.S. 325, 46 L. Ed. 2d 631, 96 S. Ct. 679 (1976), other circuits fol low the doctrine of abatement *ab initio*. See, e.g., United States v. Wright, 160 F.3d 905, 908 (2d Cir. 1998) (quoting Durham, 401 U.S. at 481); United States v. Logal, 106 F.3d 1547, 1551 (11th Cir. 1997) ("This circuit has adopted the general rule that the death of a defendant during the pen dency of his direct appeal renders his conviction and sentence void *ab initio; i.e.*, it is as if the de fendant had never been indicted and convicted."); United States v. Davis, 953 F.2d 1462, 1486 (10th Cir. 1992) (quoting Durham, 401 U.S. at 483); United States v. Wilcox, 783 F.2d 44 (6th Cir. 1986); United States v. Oberlin, 718 F.2d 894 (9th Cir. 1983); United States v. Pauline, 625 F.2d 684 (5th Cir. 1980); United States v. Moehlenkamp, 557 F.2d 126 (7th Cir. 1977).

[8] Accord United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977); see also Rosanna Cavallaro, *Better Off Dead: Abatement, Inno cence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 954 (2002) ("The abatement remedy relies significantly on a larger premise: a conviction that cannot be tested by appellate re view is both unreliable and illegitimate; the con stitutionally guaranteed trial right must include some form of appellate review.").

[9] In Douglas v. California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963), and Evitts v. Lucey, 469 U.S. 387, 392, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985), the Court "required the appointment of effective counsel for a criminal appellant pursuing a first appeal of right." Clark v. Johnson, 227 F.3d 273, 283 (5th Cir. 2000).

[10] Asset, 990 F.2d at 211; see also Mmahat, 106 F.3d at 93 (stating that "the abatement prin ciple is premised on the fact that criminal pro ceedings are penal").

[11] See, e.g., United States v. Dudley, 739 F.2d 175, 176 n.2 (4th Cir. 1984) ("A decedent can hardly serve a prison sentence."). In its brief, the government makes a similar point: "Put another way, the doctrine of abatement is applied because it serves no purpose to punish a person who is dead."

[**11] Given that the doctrine of abatement *ab initio* is largely court-created and a creature of the common law, the applications of abatement are more amenable to policy and equitable arguments. Neither of the previously-ar ticulated rationales fully explains our current approach to abatement, restitution orders, and fines paid before death. As we will explain, we adopt the finality rationale and adjust our restitution jurisprudence accordingly.

The punishment rationale supports our cur rent distinction between penal and compensatory restitution orders [12] [**12] and justifies the line, with respect to fines, drawn at the time of death. [13] Punishment does not, however, ade quately explain the other aspect of our abatement jurisprudence--the elimination of the criminal proceedings *against that person*. Presumably, under the punishment rationale, courts could retain the record of conviction and block proceedings that would punish the estate. [14]

[*415] The finality principle provides a better ex planation why all *prior* proceedings disappear. A defendant's death during appeal forces a court to decide between disregarding a finding of guilt and entering an unreviewed judgment. Presumptions of innocence and a desire to en sure guilt naturally point to extinguishing all criminal proceedings.

The primary justification for the abatement doctrine arguably is that it prevents a wrongly- accused defendant from standing convicted. The Supreme Court and other circuits have recognized this justification for abatement. We now adopt it as the primary reason behind abatement and, by so doing, we reject [**13] Assef's and Mmahat's descriptions of the punishment justification.

Accordingly, regardless of its purpose, the order of restitution cannot stand in the wake of Parsons's death. Because he now is deemed never to have been convicted or even charged, the order of restitution abates *ab initio*. [15]

[**14] IV.

Although the government may argue that this approach harms the interests of those al legedly injured, such an argument cannot out weigh the finality rationale. HN5[↑] "The goal of the [compensatory restitution] payment is . . . to restore the victim's losses." Asset, 990 F.2d at 214. If the restitution order abates with the death of the defendant, those "victims" will not be made whole, or at least not by way of direct restitution from the defendant or his estate. [16]

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[12] Mmahat, 106 F.3d at 93 ("When restitution is ordered simply to punish the defendant, it is penal and abates with the rest of his conviction.").

[13] Following death, the state retains already- paid fines but does not require payment of out standing unpaid fines.

[14] The courts could use the punishment ration ale to prevent use of the conviction in civil court and to retain the decedent's good name. The for mer application could be accomplished without eliminating the conviction altogether, and the lat ter use does not seem significant enough to war rant extinguishing all prior proceedings.

[15] The dissent argues that restitution orders are "expressly compensatory, non-punitive, and equivalent to a civil judgment against a criminal defendant" and criticizes our approach as "treating the restitution order as abatable and therefore impliedly punitive." This response overlooks the approach we have taken in deciding this case. Our aim is to craft a coherent and consistent means of applying abatement *ab initio* to restitution orders. As we have shown, the best explanation for abatement--the finality rationale--does not support a distinction between compensatory and punitive awards. Instead, it mandates that all vestiges of the criminal proceeding should disappear.

In contrast, the dissent skips the primary ques tion of how abatement and restitution interact and assumes the continued existence of the compen satory-penal dichotomy. The dissent's citations to United States v. Bach, 172 F.3d 520 (7th Cir. 1999), and Newman v. United States, 144 F.3d 531 (7th Cir. 1998), suffer from the same prob lem. Both cases assume that restitution orders should be described as either compensatory or penal. Neither considers the overall purpose be hind abatement *ab initio* and how such a purpose would affect *all* restitution orders. The traditional dichotomy cannot remain, however, if we are to craft a consistent regime that incorporates statu tory elements--such as the Victim and Witness Protection Act-- and two forms of equitable doctrine.

[16] The government argues, at length, that the instant restitution order was intended to make whole the victims of Parsons's fraud: "Unlike a fine, restitution does not deprive the estate of money the defendant may have rightfully ac quired; instead it removes tainted money that de fendant unlawfully obtained . . . ." Examples of such uncompensated victims undoubtedly exist. In United States v. Logal, 106 F.3d 1547 (11th Cir. 1997), the court abated a seemingly compen satory restitution order entered against a defen dant convicted of numerous illegal financial deal ings. Despite the time invested in the trial and the guilty verdict, those whom the decedent allegedly defrauded could not collect through the federal criminal courts.

[**15] The government's position may have val idity under the punishment rationale, but it has little force if the concern is finality and the right of the defendant to contest his appeal at least once. Any references to the wrongful na ture of the defendant and his actions are con ditioned on an appellate court's upholding the conviction, assuming [*416] the defendant pursues an appeal. The defendant's death during the pen dency of appeal pushes a court to nullify all prior proceedings. Despite what may have been proven at trial, the trial is deemed not to have taken place. Thus, at least in the eyes of the criminal court, the defendant is no longer a wrongdoer and has not defrauded or damaged anyone..

These unfortunate situations also create the danger of misusing the term "victim" in different contexts–civil and criminal–with the same force. One is not necessarily a victim of a crime because he suffers a loss at the hands of another. The loss may arise from poor de cisions on the part of the alleged victim, poor drafting on the part of the attorneys, or even questionable conduct on the part of the defendant. None of these situations, however, nec essarily warrants a criminal conviction. HN6[↑] The [**16] abatement doctrine provides that one should not be permanently labeled as finally "con victed" while his first appeal is pending. That is to say, in abatement the criminal court es sentially abdicates its power over the former defendant. [17]

[**17] V.

The aforementioned justifications for alter ing our abatement doctrine rely on equitable rationales. Perhaps more importantly, as the estate argues, our current willingness to let compensatory restitution orders survive the death of the defendant runs contrary to the text of the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(a)(1)(A).

HN7[↑] The VWPA allows a court to enter a restitution order when "sentencing a defendant *convicted* of an offense." 18 U.S.C. § 3663 (a)(1)(A) (emphasis added). If death terminates the criminal case *ab initio*, the defendant no longer stands convicted. One might respond to this natural reading by arguing that "convicted of an offense" has force only on the day on which the restitution order is entered. Because the defendant stands convicted on the day the court enters the order, retaining the order after the defendant's death would not conflict with the VWPA.

Additional text of the VWPA, however, suggests that "convicted" should not have force merely at the time of the restitution or der. Section 3663(d) references 18 U.S.C. § 3664 as the enforcement mechanism [**18] for re imbursement orders. Section 3664(*l*) describes the effect of a conviction on future civ il actions: HN8[↑] "A conviction of a defendant for an offense involving the act giving rise to an or der of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding."

HN9[↑] A standard canon of construction "provides that a word used in different parts of the stat ute should be construed to [*417] have the identical meaning throughout the entire statute." [18] [**19] If the narrower construction of "convicted" is applied to § 3664(*l*), an estate would be es topped from denying important factual matters in a subsequent civil suit, *even if the underlying conviction had been abated.* [19] HN10[↑] Just as a trial conviction, after abatement, should not estop an estate from mounting a defense in civil court, one whose conviction is abated no longer stands

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[17] Merely because the *criminal* proceeding abates, however, does not necessarily mean that an individual who suffered a loss cannot obtain re imbursement in *civil* court. If he can meet the civil court's lower burden of proof, he may re ceive a judgment from that court. The criminal court that entered the prior reimbursement order, however, should not retain any power over that prior defendant.

One may argue that allowing the estate to sub stitute for the dead defendant ensures the fair rep resentation of the decent's interests, but such a substitution does not align logically with the abatement of all prior criminal proceedings. Es sentially, the substitution doctrine forces the es tate to argue about a conviction that no longer exists and requires a court to adjudicate the merits of a proceeding that no longer took place. Al though it is not without a cost, requiring victims to argue their case in civil court protects the interests of defendants whose direct appeals are not yet final.

[18] Miss. Poultry Ass'n v. Madigan, 992 F.2d 1359, 1363 (5th Cir.), *modified*, 9 F.3d 1113 (5th Cir.), *vacated on other grounds for reh'g en banc*, **9 F.3d 1116 (5th Cir. 1993)**, *opinion on reh'g*, 31 F.3d 293 (5th Cir. 1994) (en banc)

[19] Admittedly, one could argue that "convict ed" and "conviction" have different meanings. A defendant may be convicted on a given day and will always be convicted on that day. The con viction, in contrast, may abate or dissolve. This distinction, however, ignores the effect of abate ment on either situation. After abatement, the de fendant no longer stands convicted on that date, and no conviction exists.

"convicted" for purposes of the VWPA. [20]

VI.

The estate argues that the finality principle also requires the government to return the money paid pursuant [**20] to the Preliminary Judgment of Forfeiture. The government stridently disagrees.

The panel noted that HN11[↑] "the doctrine of abatement does not apply to fines, forfeitures, and restitution paid *prior to* a defendant's death." Parsons, 314 F.3d at 748 (emphasis added, ci tations omitted). Fines that have not yet been paid, however, abate in the same manner as do the prior criminal proceedings. *Id.* *Asset* and similar cases have distinguished between fines paid before and after a defendant's death, based on the punishment rationale. [21]

The question [**21] is whether the tender to the government of the check for $ 970,826.90, at the real estate closing, was a voluntary, irrevo cable payment, as the government contends, or was, instead, only a means of preserving as sets pending the outcome of the appeal. The government argues that by giving the check, "Parsons paid and the government collected the Money Judgment of criminal forfeiture . . . . The United States collected Parsons' payment in full satisfaction of the Money Judgment."

The agreement and the order provide for full return of the money, with interest, if Par sons "prevails in the final determination of this appeal." [22] Although, as explained, [*418] we conclude that restitution orders against Parsons should abate with his death, neither the agreement nor the Preliminary Judgment of Forfeiture requires the government to return the already-paid funds.

[**22] HN12[↑] "The law . . . existing at the time a contract is made becomes a part of the contract and governs the transaction." Tex. Nat'l Bank v. Sandia Mortgage Corp., 872 F.2d 692, 698 (5th Cir. 1989) (internal citation and quotation marks omitted) (applying Texas law). [23] When the government and Parsons entered into this agreement, abatement did not require the re turn of penalties paid before a defendant's death. [24] Nothing in the agreement or the spe cific facts of this case suggests that the parties intended to avoid that pre-existing rule.

Although the estate might receive the [**23] funds if Parsons "prevails" on appeal, he has not achieved a victory, taken any action, or made any substantive points worthy of overturning his conviction. Rather, at the time of his death, this court had made no decision on the merits of the appeal. Although, based on the abatement rationale, the restitution orders must abate, Parsons has not "prevailed" in any meaningful sense.

Presumably in an effort to protect his interests, Parsons voluntarily entered into the agreement memorialized in the Preliminary Judgment of Forfeiture. That agreement, however, did not adequately provide for his death and did not indicate that the parties wished to act outside the legal framework at the time they entered into the contract. [25] Consequently, although Parsons died, we have not validated any of his grounds for appeal, and he

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[20] The dissent discusses, at length, the Mandatory Victim Restitution Act ("MVRA"). The parties, however, did not argue the MVRA in the context of this case. Instead, they generally fo cused on the equitable doctrines, how they inter acted with one another, and how the *VWPA* af fected that analysis. Even if we consider the MVRA, however, it references the same enforce ment provision–18 U.S.C. § 3664–as does the VWPA. Consequently, using the MVRA as a means of keeping the compensatory-penal dichot omy fails, for the reasons we have discussed.

[21] Asset, 990 F.2d at 214 ("The rule of abate ment has never been applied to require the return of money paid by a defendant prior to his death and has, in fact, been held inapplicable to fines–obviously penal–paid by a defendant be fore his death."); *see also* United States v. Zizzo, 120 F.3d 1338, 1343 (7th Cir. 1997) (stating that fines paid prior to death "are analogous to time served and are not refundable.").

[22] The agreement has two requirements: "In the event Defendant Parsons prevails in the final determination of this appeal, and no Final Judg ment of Forfeiture is entered in this case, the [gov ernment] shall return to Defendant Parsons . . . the entire amount of $ 970,826.90, plus interest." The estate has satisfied the second requirement, as no final judgment has been entered. Thus, we ad dress only whether Parsons "prevailed in the fi nal determination of this appeal."

[23] We have no occasion here to comment on, and we express no opinion on, a situation in which there is no agreement or order, such as those pres ent in this case, conditioning return of the forfeit ed sums on the outcome of the appeal.

[24] *See, e.g.*, Asset, 990 F.2d at 214 ("The rule of abatement has never been applied to require the return of money paid by a defendant prior to his death . . . .").

[25] This analysis pertains only to Parsons and this particular agreement. Other agreements may contemplate the possibility of the defendant's death during the pendency of an appeal.

has not "prevailed." He is not entitled to the return of the monies paid under the Preliminary Judgment of Forfeiture.

[**24] VII.

Thus, as part of ensuring that every defendant has an opportunity to challenge his conviction by one direct appeal, *HN13*[↑] we expunge the criminal proceedings and the pending punishments attached to those proceedings if the de fendant takes an appeal and dies during its pendency. In the instant case, this includes an unpaid restitution order. Based on the particular language of the Preliminary Judgment of Forfeiture, Parsons did not meet the judg ment's requirements, so we DENY his request to require the return of sums paid under that order.

This appeal is DISMISSED, and this matter is REMANDED with direction to VACATE the judgment of conviction and sentence, in cluding the order of restitution, and to dismiss the indictment. To the extent that they are in consistent herewith, *Asset* and *Mmahat* are overruled

Concur by: DENNIS [In Part]

Dissent by: DENNIS [In Part]

Dissent

DISSENT: DENNIS, Circuit Judge, joined by HIGGINBOTHAM, DAVIS, WIENER, BENAVIDES, and STEWART, Circuit Judges, dissenting in part and specially concurring in part:

> I respectfully disagree with the majority's decision to (1) overrule our long-standing [*419] circuit precedents of *United States v. Mmahat, 106 F.3d 89 (5th Cir. 1997)* and *United States v. Asset, 990 F.2d 208 (5th Cir. 1993),* [**25] [26] which held that a

[26] The majority's unique "finality rationale," even if valid, does not justify overruling *Mmahat* and *Asset*. The majority's *raison D'etre* for creating the "finality rationale" is that "all consequences of the *untested* criminal conviction should abate," maj. slip op. p.2 (emphasis added), so that "neither the state nor affected parties should enjoy the fruits of an *untested* conviction." *Id.* p.5 (emphasis added). In *Mmahat* itself, however, this court has already created a procedure for testing the conviction of a defendant who dies during pendency of the appeal so that compensatory restitution consequences or fruits would not flow from an untested conviction. The *Mmahat* court held that the compensatory restitution order against the deceased defendant did not abate; instead, his heirs' motion to substitute for him and continue the appeal in his place was granted, and his arguments which potentially could result in a reversal of the restitution order were fully considered. *Mmahat, 106 F.3d at 93*. Thus the majority has not shown a sufficient legal reason for overruling *Mmahat* and *Asset* because the perceived evil of an unreviewed and untested compensatory restitution order has been adequately remedied by *Mmahat* itself.

Mmahat and *Asset* also have already attained the "finality rationale's" goal of eliminating the punitive effects of an unreviewed criminal conviction by assuring "that the state should not label one as guilty until he has exhausted his opportunity to appeal" maj. slip op. p.4; preventing the "entering [of] an unreviewed judgment" *Id.* p.5; and "preventing a wrongly-accused defendant from standing convicted." *Id.* p.6. Under *Mmahat* and *Asset*, the penal aspects of the judgment of conviction, which label or give the accused status as a "convicted criminal," abate immediately upon the death of the defendant, and, as already noted, the heirs or estate of the deceased can pursue the appeal and take full advantage of the chance to have any judgment of compensatory restitution reviewed and reversed. Thus, the concrete objects and effects sought by the "finality rationale" are already accessible under *Asset* and *Mmahat*. There is no reason to create a new legalistic doctrine, and even if created it does not require overruling those Circuit precedents.

Contrary to the inference that might be drawn from a casual reading of the majority's citations, the "finality rationale" is a completely novel judicial creation which has not been embraced or even suggested by the other courts. The majority cites *United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980)* and *United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)*. *See* maj. slip op. p.4, but they do not support or even mention that rationale. *Pauline* and *Moehlenkamp* merely hold that the Supreme Court's decision in *Dove v. United States, 423 U.S. 325, 46 L. Ed. 2d 531, 96 S. Ct. 579 (1976)* to dismiss pending petitions for certiorari upon the petitioner's death, overruling its previous practice of abatement followed in *Durham v. United States, 401 U.S. 481, 28 L. Ed. 2d 200, 91 S. Ct. 858 (1971)*, was not meant to alter the longstanding rule of lower federal courts of abatement of the entire criminal proceedings upon death of an appellant during the pendency of his appeal. *Pauline* and *Moehlenkamp* dealt only with the abatement of the punitive aspects of criminal convictions; the question of whether compensatory restitution survives the appellant's death was not presented.

The majority was apparently inspired to create the "finality rationale" by a single law review article. maj. slip op. p.4 (citing and quoting Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 73 U. Colo. L. Rev. 943, 954 (2002)*). In her article, Ms. Cavallaro argues that

restitution [*420] order, because it is compensatory rather than punitive, does not abate with the defendant's criminal conviction and punishment when he dies while his appeal is pending; and (2) judicially create a rule, contrary to federal statutes and common law, that a judgment requiring a criminal defendant to make restitution to his victims also abates upon his death.

[**26] The well reasoned decisions in *Mmahat* and *Asset* established the sound and just majority rule that, when a person adjudged guilty of a crime dies while his appeal is pending, (1) the trial court's restitution order requiring him to compensate his victims for the harm done them by his crimes does not abate or disappear, because it is compensatory rather than penal; (2) the restitution order continues to have effect as a civil judgment enforceable against his estate; but (3) his estate may move to be substituted in his place and pursue the appeal, which, if successful, will require that the restitution judgment be cancelled. *See* Mmahat, 106 F.3d at 93.

The majority now holds that, when a criminal defendant dies during his appeal, the restitution judgment immediately abates and is voided, leaving his estate the windfall of any fruit of his crime, and requires that his victims go uncompensated for their harm, and leaves in doubt whether they must turn over to the criminal defendant's estate any restitution previously received. *See* Slip Op. at 2, 10.

1.

The majority's decision conflicts with the policy and provisions of the Mandatory Victims Restitution Act [**27] of 1996 (MVRA) and the Victim and Witness Protection Act of 1982 (VWPA) [27] and undermines the Congressional objective of requiring Federal criminal defendants to pay compensatory restitution to the identifiable victims of their crimes.

[**28] Congress enacted the VWPA in 1982, 18 U.S.C. § 3663 (1982), to authorize, but not require, district courts, within their discretion, to order restitution to victims of criminal conduct. *Id.* § 3663(a)(1)(A). [28] In determining [*421] whether to order restitution, and how much, the court was required to consider, along with the loss sustained by each victim, the financial

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the right to appeal from a criminal conviction should be and is evolving into a constitutional right. She sees the adoption of the remedy of abatement *ab initio* by a large majority of courts as an important "strand" which, together with others, "are forceful arguments for formal, legal recognition of an evolution in criminal procedure [toward constitutionalization of the right to appeal]." *Id.* 986. In furthering her argument for the constitutional right to appeal, she says that "the abatement remedy relies significantly on a larger premise: a conviction that cannot be tested by appellate review is both unreliable and illegitimate[.]" *Id.* 954 It does not follow from this statement or the article as a whole that courts should create a "finality rationale" as espoused by the majority; nor does it follow that the dual mechanism provided by *Asset* and *Mmahat*, i.e., abatement ab initio of all punitive consequences of the criminal proceedings together with the right to continue the appeal with respect to the compensatory restitution decree, does not adequately satisfy the needs for reliability and legitimacy in criminal proceedings.

[27] The MVRA supersedes the VWPA, in part, and mandates restitution with respect to, inter alia, mail fraud crimes (such as those committed by Parsons), of which the defendant is convicted on or after the date of the MVRA's enactment. See S. Rep. 104-179, 104th Cong., 2nd Sess. 13, *reprinted in* 1996 U.S. Code Cong. & Admin. News 926 (indicating that the MVRA is designed to further the purposes of the VWPA); Pub. L. No. 104- 132 § 211, 110 Stat. 1241 (1996) (stating that the MVRA shall apply to convictions on or after the date of the MVRA's enactment); 18 U.S.C. § 3663A(c)(1)(A) (listing the types of crimes to which the MVRA applies); *United States v. Caldwell*, 302 F.3d 399, 419 (5th Cir. 2002) (holding that mail fraud is a crime to which the MVRA applies). For the reasons discussed below, I believe the MVRA is not an ex post facto law, but a compensatory, non-punitive remedy which applies retroactively to all such convictions regardless of the date of the commission of the crime. In any event, the policy and provisions of the MVRA should be carefully and fully considered in this major policymaking decision having broad future ramifications under the MVRA and VWPA.

[28] The majority argues that the restitution order under this statute should abate because, after the criminal case is abated *ab initio*, the defendant no longer stands "convicted." See maj. slip op. p.7. But the language in question on its face uses the term "convicted" in the context of "when [the district court is] sentencing" the defendant. Because Parsons stood convicted during sentencing, the restitution order was issued during sentencing, and the restitution order has the effect of a civil judgment rendered at that time, *see infra* notes 5-11 and accompanying text, the restitution order is valid.

The majority then tries to analogize to section 3664(l), which refers to the effect of a conviction in subsequent proceedings, arguing that the term "convicted" must have the same meaning in both of these sections. But the word "convicted" has no temporal element; the temporal thrust of each section is provided by the context in which the word "convicted" or "conviction" is used. Thus, the majority's analogy is inherently flawed.

resources and family needs of the defendant. *Id.* § 3663(a)(1)(B). Prior to today's decision herein, a majority of circuits, including this Fifth Circuit, had held that restitution orders under the VWPA were compensatory and therefore non-abatable. *See* United States v. Asset, supra; United States v. Mmahat, supra; *see also* United States v. Christopher, 273 F.3d 294, 299 (3rd Cir. 2001); United States v. Johnson, 1991 U.S. App. LEXIS 17204 (6th Cir. 1991) (unpublished); United States v. Dudley, 739 F.2d 175 (4th Cir. 1984). *But see* United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (holding that restitution orders are punitive and should abate with the death of a criminal defendant during [**29] his appeal).

[**30] In 1996, Congress enacted the MVRA, 18 U.S.C. § 3663A (1996), which mandates restitution for certain crimes and clearly indicates that such restitution is compensatory and non-abatable. The MVRA superseded in part the VWPA, with respect to the designated crimes, *Id.* § 3663A(c), and, as its name indicates, mandatorily requires that, in sentencing a defendant convicted of, inter alia, "an offense against property, including any offense committed by fraud or deceit," the court "shall order...that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." *Id.* §§ 3663A(c), 3663A(a).

Further, the MVRA amended the VWPA to provide that restitution orders under the VWPA shall be issued and enforced in accordance with § 3664, which sets forth the enforcement provisions of the MVRA. *See* § 3663(d). ("An order of restitution made pursuant to this section shall be issued and enforced in accordance with Section 3664."). In each restitution order under the MVRA and the VWPA, as amended, the court "shall order restitution to each victim in the full amount of each victim's losses as determined by the court [**31] and without consideration of the economic circumstances of the defendant." *Id.* § 3664(f)(1)(A). [29]

Under the MVRA and the VWPA, as amended, the court's restitution order expressly creates a property right for the victim or his estate which has the effect of a civil judgment against the criminal defendant or his estate. A restitution order is a heritable, [30] assignable, [31] civil judgment "in favor of such victim", [32] [**33] and, when properly [*422] recorded, "shall be a lien on the property of the defendant...in the same manner . . . as a judgment of a court of general jurisdiction. . . ." [33] The judgment of restitution carries potential civil effects of joint and several liability, res judicata or collateral estoppel, and subrogation: When plural defendants contribute to the loss of the victim the court may make each defendant liable for payment [**32] of the full amount of restitution. [34] A defendant ordered to make restitution is estopped from denying the essential allegations of the offense in subsequent civil proceedings. [35] An insurer or other person who compensates the victim for loss covered by a restitution order may to the extent of the payment be subrogated to the victim's right against the restitution debtor. [36]

While the foregoing provisions demonstrate that Congress carefully designed the restitution ordered under the MVRA and the VWPA, as amended, to be a compensatory remedy for crime victims, other provisions of § 3664 protect the defendant from possible punitive effects. In case of property loss, the order may

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[29] The defendant's financial circumstances are relevant only to fixing a payment schedule for the mandatory restitution. 18 U.S.C. § 3664(f)(2)-(4).

[30] The MVRA expressly provides that if the victim is deceased the court shall order restitution to the victim's estate. *Id.* § 3663(a)(1)(A); this provision implies that the right created by the restitution order is heritable property.

[31] *Id.* § 3664(g)(2).

[32] Id. § 3664(m)(i)(B), which provides:

> At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

[33] *Id.*

[34] *Id.* § 3664(h).

[35] *Id.* § 3664(l).

[36] *Id.* § 3664(i)(1).

require only a return of the property or payment equal to the value of the property. [37] In case of bodily injury, the order may compensate the victim only for specified losses, e.g., medical and therapeutic expenses, lost income, funeral expenses, child care expenses, transportation expenses, and expenses related to the prosecution. [38]

Thus, the court cannot order restitution for compensatory damages related to pain, suffering, mental or emotional distress [**34] or for punitive damages. Additionally, any amount paid to a victim under a restitution order shall be reduced by the victim's recovery of compensatory damages for the same loss in civil proceedings. [39]

In sum, an order of restitution under the MVRA or the VWPA, as amended, is expressly compensatory, non-punitive, and equivalent to a civil judgment against a criminal defendant requiring that he compensate his victims for the specified elements of the harm done to them by his offenses. Consequently, the majority's decision conflicts with the statutory scheme by treating the restitution order as abatable and therefore impliedly punitive. The decision thereby divests the victims of vested rights established by the restitution order as a civil judgment. On the other hand, *Mmahat* and *Asset*, which the majority overrules, are fully consistent with the MVRA, the VWPA, as amended, and their objectives. The majority's decision plainly clashes with and undermines the Congressional policy [**35] implemented by the VWPA and the MVRA.

2.

The majority opinion disregards or refuses to follow the well reasoned opinions of other Circuits that carefully analyze the VWPA and the MVRA and conclude that restitution orders under them are compensatory and do not constitute criminal punishment [*423] for ex post facto or abatement purposes. [40]

[**36] Chief Judge Posner, in *United States v. Bach, 172 F.3d 520 (7th Cir. 1999)*, succinctly and persuasively stated the reasons that MVRA restitution orders are compensatory, rather than criminal punishment, and therefore cannot run afoul of the ex

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[37] *Id. § 3663(b)(1).*

[38] *Id. § 3663(b)(2).*

[39] *Id. § 3664(i)(2).*

[40] The majority asserts that its "finality rationale. . . . mandates that all vestiges of the criminal proceeding should disappear." maj.op.n.13. Because the compensatory/penal analysis would not result in total abatement, the majority rejects it summarily. *Id.*

Until the majority's decision rejecting the compensatory/penal analysis, it had been adopted and used unanimously. *See Mmahat, 106 F.3d 89, 93* (using the penal-compensatory dichotomy); *Asset 990 F.2d at 213-14* (same); *see also United States v. Christopher, 273 F.3d 294, 298-99 (3rd Cir. 2001)*(same); *United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997)* (same); *United States v. Dudley, 739 F.2d 175, 177-78 (4th Cir. 1984)* (same); *United States v. Johnson, 1991 U.S. App. LEXIS 17204 (6th Cir. 1991)* (unpublished) (citing *Dudley*). By rejecting the analysis and the unanimous weight of authority, the majority opinion places this Circuit in a *sui generis* position of isolation.

The compensatory/punitive test is part of the well settled doctrine that death abates a criminal penalty because, once the defendant is dead, there is no longer a justification for the punishment of him or his estate; but the defendant's death does not affect the justification for restitution intended only to compensate the victim; accordingly, such restitution survives and its payment will not undermine the purposes of abatement since the goal of the payment is not to punish the defendant, or his estate, but to restore the victim's losses. *See, e.g., Asset, 990 F.2d at 214* (citing *United States v. Morton, 635 F.2d 723, 725 (8th Cir. 1980)*; *United States v. Bowler, 537 F. Supp. 933, 935 (N.D. Ill. 1982)*). Restitution also serves the non-penal purpose of removing benefits derived by wrongdoing from the defendant's estate, which would otherwise be unjustly enriched, and using them to repair the victim's losses. *Christopher, 273 F.3d at 299, cert. denied, 536 U.S. 964, 153 L. Ed. 2d 847, 122 S. Ct. 2674 (2002)*("To absolve the estate [of the defendant] from refunding the fruits of the wrongdoing would grant an undeserved windfall.")

Most important, as the text of this dissenting opinion explains, Congress in the MVRA and the VPWA has confirmed the merit of the compensatory/punitive test by providing that judgments of compensatory restitution for crime victims shall have the force and effect of civil judgments, which under the federal and common law do not abate but survive the death of the defendant judgment-debtor.

The majority erroneously claims that it has crafted a "consistent regime that incorporates statutory elements-such as the Victim and Witness Protection Act . . . ." Maj. slip op. at 6 n.13. Instead, the majority has simply expanded the judicially-created rule of *ab initio* abatement far beyond its original purpose to, in effect, judicially overrule the national policy and legislated law of restitution of crime victims enacted by Congress in the MVRA and VWPA.

post facto prohibition. [41] He explained that [*424] the MVRA is not penal but is functionally a compensatory torts statute:

> The Act requires the court to identify the defendant's victims and to order restitution to them in the amount of their loss. In other words, definite persons are to be compensated for definite losses just as if the persons were successful tort plaintiffs. Crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts: the crime of theft is the tort of conversion; the crime of assault is the tort of battery--and the crime of fraud is the tort of fraud. Functionally, the Mandatory Victims Restitution Act is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished. The Act enables the tort victim to recover his damages in a summary proceeding [**37] ancillary to a criminal prosecution. We do not see why this procedural innovation, a welcome streamlining of the cumbersome processes of our law, should trigger rights under the *ex post facto clause*. It is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in the sentencing phase of a criminal prosecution. It would be different if the order of restitution required the defendant to pay the victims' losses not to the victims but to the government for its own use and benefit; then it would be a fine, which is, of course, traditionally a criminal remedy.

Bach, 172 F.3d at 522-23 (internal citations omitted)(emphasis added).

[**38] The Seventh Circuit's decision in *Newman v. United States*, 144 F.3d 531 (7th Cir. 1998), provides further analysis demonstrating that restitution under the MVRA does not qualify as criminal punishment. (1) "Restitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions." *144 F.3d at 538* (citing Restatement of Restitution (introductory note) (1937)). "It is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others' expense." *Id.* (Citing 1 George E. Palmer, The Law of Restitution § 1.1, at 5 (1978)); (2) The non- punitive character of restitution had been recognized by the Seventh Circuit and other courts in previous cases. *Id. 538-39* (Citing *United States v. Black*, 125 F.3d 454, 467 (7th Cir. 1997) (restitution under the *Child Support Recovery Act of 1992* was not punishment); *United States v. Hampshire*, 95 F.3d 999, 1006 (10th Cir. 1996) (same); *United States v. Arutunoff*, 1 F.3d 1112, 1121 [**39] (10th Cir.) (The VWPA's purpose is not to punish defendants but to make victims whole to the extent possible); *United States v. Rochester*, 898 F.2d 971, 983 (5th Cir. 1990) (same)); (3) The nature of the restitution order authorized by the VWPA or the MVRA is not a punitive sanction when analyzed under the factors set forth by *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963) for deciding whether a statutory scheme was so punitive in purpose or effect as to transform what was intended as a civil remedy into a criminal penalty. *See Newman*, 144 F.3d at 540 (citing *Kansas v.* [*425] *Hendricks*, 521 U.S. 346, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997); *Hudson v. United States*, 522 U.S. 93, 139 L. Ed. 2d 450, 118 S. Ct. 488 (1997)).

Accord: United States v. Nichols, 169 F.3d 1255 (10th

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[41] Some courts, without functional analysis or reasoning, treat restitution under the VWPA and MVRA as a criminal penalty. *See United States v. Edwards*, 162 F.3d 87, 89-90 (3rd Cir. 1998) (collecting cases). They rely on formalistic classification of the restitution order as criminal because it issues during the sentencing proceeding; they fail to recognize the modern practice of using civil proceedings as ancillary to criminal actions. *See* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 Buff. Crim. L.R. 679, 686-89 (1999) (noting the MVRA as an example). Though courts are authorized to issue restitution orders in criminal proceedings, restitution under the MVRA and VWPA is functionally a tort remedy-a streamlining of procedures that allows a victim to recover a compensatory remedy though "a summary proceeding ancillary to a criminal prosecution." *See Bach*, 172 F.3d at 523 (citing, *inter alia*, Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L.J. 775, 782-83 (1997)).

Indeed, the acts within which the MVRA and VWPA are contained were not passed as solely criminal acts. The MVRA was simply one part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which contains both criminal and civil legislation. *See* Pub. L. 104-132, 110 Stat. 1214 (1996). For example, AEDPA contains, among other provisions, sections involving habeas corpus reform and provisions relating to civil lawsuits brought against terrorist states. *Id.* In addition, the VWPA is primarily a civil act providing for compensatory restitution. In other words, both the MVRA and the VWPA were passed as part of legislative enactments that created both civil and criminal reforms.

Cir. 1999); United States v. Arutunoff, 1 F.3d 1112, 1121 (10th Cir. 1993)("The VWPA's purpose is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses.")(citing United States v. Rochester, 898 F.2d 971, 983 (5th Cir. 1990)). [**40]

For similar reasons, the majority of circuits that have addressed whether MVRA or VWPA restitution orders are abatable, decided that, because such orders are compensatory rather than punitive, the death of the defendant during appeal does not cause them to abate. See United States v. Christopher, 273 F.3d 294, 298 (3rd Cir. 2001) ("To absolve the estate from refunding the fruits of the wrongdoing would grant an undeserved windfall...abatement should not apply to the order of restitution in this case...."); United States v. Mmahat, supra; United States v. Asset, supra; United States v. Johnson, 1991 U.S. App. LEXIS 17204 (6th Cir.) (unpublished) (same); United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984) (same). [42]

[**41] 3.

The majority's decision is contrary to the general principles of federal and common law pertaining to abatement, survival, and revival of actions and judgments. With respect to a cause of action created by act of Congress, it is well settled that the question of whether it survives the death of a party by or against whom it has been brought is not one of procedure but one which depends on federal substantive law. Schreiber v. Sharpless, 110 U.S. 76, 80, 28 L. Ed. 65, 3 S. Ct. 423 (1884); See 7C Wright, Miller & Kane §§ 1952 & 1954 (2d ed 1986). If no specific provision for survival is made by federal law, as in the present case, the cause survives or not according to the principles of common law. Patton v. Brady, 184 U.S. 608, 46 L. Ed. 713, 22 S. Ct. 493 (1902); Ex parte Schreiber, supra. Generally, an action is not abated by the death of a party after the cause has reached a verdict or final judgment and while the judgment stands, 1 Am Jur 2d, Abatement, Survival and Revival § 61, n.26 (citing Connors v. Gallick, 339 F.2d 381, 31 Ohio Op. 2d 305 (1964); Smith v. Henger, 148 Tex 456, 226 S.W.2d 425, 20 ALR2d 853 (1950). [**42] et al.), even if the judgment is based on a cause of action that would not have survived had the party died before judgment. Id. § 61, n.27.(citing Mayor, etc., of Anniston v. Hurt, 140 Ala 394, 37 So 220 (1903), et al.). "So long as the judgment remains in force, the rule on survival has no further application,[] even where the proceedings are stayed by appeal and supersedeas." Id., nn. 28 and 29 (citing authorities).

A restitution order issued under the MVRA has the effect of a judgment "entered in favor of such victim in the amount specified in the restitution order." [43] It is undisputed that the defendant Parsons's death occurred after the special verdict and restitution order were entered. Consequently, under the substantive principles [*426] of federal and common law pertaining to abatement, survival and revival, the judgment of restitution survived and was not abated by the defendant's death. Id.

4.

I respectfully concur [**43] in the result reached by the majority opinion in not ordering the government to return sums already paid. Because I would not overrule this Circuit's precedents in *Mmahat* and *Asset* but would adhere to them, I cannot join the majority in reasons related to this point. As I read those Circuit precedents, the rule of abatement does not apply to require the return of money paid by a defendant prior to his death as forfeiture, fine or restitution. I do not join in the expungement order because I am uncertain as to whether this relief was requested or whether the estate would be entitled to it if it had been prayed for.

For the foregoing reasons, I respectfully dissent in part and specially concur in part in the majority opinion.

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[42] One Circuit court concluded, with little analysis or reasoning, that restitution orders are punitive and therefore should abate when a defendant dies during his appeal. See United States v. Logal, 106 F.3d 1547 (11th Cir. 1997).

[43] § 3664(m)(i)(B). See note 7, supra.

Neutral
As of: February 8, 2018 8:49 PM Z

Brass v. State

Supreme Court of Nevada

May 29, 2014, Filed

No. 56146

Reporter
325 P.3d 1256 *; 2014 Nev. LEXIS 46 **; 130 Nev. Adv. Rep. 35; 2014 WL 2396055

STEPHANIE BRASS, AS PERSONAL REPRESENTATIVE FOR RONNIE DANELLE BRASS, Appellant, vs. THE STATE OF NEVADA, Respondent.

Prior History: [**1] Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit kidnapping and murder, first-degree kidnapping, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Brass v. State, 306 P.3d 393, 2013 Nev. LEXIS 64 (2013)

Disposition: Reversed.

Counsel: David M. Schieck, Special Public Defender, and JoNell Thomas and Michael W. Hyte, Deputy Special Public Defenders, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Steven S. Owens, Chief Deputy District Attorney, and David L. Stanton and Nancy A. Becker, Deputy District Attorneys, Clark County, for Respondent.

Judges: Douglas, J. We concur: Gibbons, C.J., Pickering, J., Hardesty, J., Parraguirre, J., Cherry, J., Saitta, J.

Opinion by: DOUGLAS

Opinion

[*1256] BEFORE THE COURT EN BANC.

By the Court, DOUGLAS, J.:

In this opinion, we consider whether a judgment of conviction must be vacated and the prosecution abated when a criminal defendant dies while his or her appeal from the judgment is pending. We hold that although a deceased appellant is not entitled to have his or her judgment of conviction vacated and the prosecution abated, a personal representative may be substituted as the appellant [**2] and continue the appeal when justice so requires. In this appeal, we reverse the judgment of conviction based on an error during jury selection.

FACTS

The State charged Ronnie Brass and his brother, Jermaine Brass, as codefendants with burglary, grand larceny, conspiracy to commit kidnapping, first-degree kidnapping, conspiracy to commit murder, and murder with the use of a deadly weapon. Jermaine [*1257] and Ronnie jointly filed a motion to sever their trials. The district court denied the motion, and the two were tried together.

During voir dire, defense counsel argued that the State violated *Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*, because it exercised a peremptory challenge to exclude prospective juror no. 173 not based on lack of qualifications, but based on the prospective juror's race. Prior to holding a hearing on Jermaine and Ronnie's *Batson* challenge, the district court excused a number of prospective jurors, including prospective juror no. 173. Subsequently, the district court conducted the *Batson* hearing and—after concluding that the State had race-neutral reasons for its peremptory challenge—denied the defense's *Batson* challenge.

At the conclusion of the trial, the jury found Jermaine guilty on all six counts and found [**3] Ronnie guilty on four counts, excluding burglary and grand larceny. The brothers filed separate appeals.

In Jermaine's appeal, this court reversed his conviction and remanded the matter for a new trial based on our conclusion that the district court committed reversible

error during the jury selection phase of Jermaine and Ronnie's trial. *See* Brass v. State, 128 Nev. , 291 P.3d 145 (2012). Specifically, we held that "[Jermaine and Ronnie] were not afforded an adequate opportunity to respond to the State's proffer of race-neutral reasons [for its peremptory challenge of juror no. 173] or to show pretext because the district court permanently excused juror no. 173 before holding a *Batson* hearing," and that such dismissal of juror no. 173 "had the same effect as a racially discriminatory peremptory challenge because even if [Jermaine and Ronnie] were able to prove purposeful discrimination, they would be left with limited recourse." *Id.* at , 291 P.3d at 149. We concluded that reversal of Jermaine's conviction was warranted because the "discriminatory jury selection constitute[d] structural error that was intrinsically harmful to the framework of the trial." *Id.*

On appeal, Ronnie raises the same *Batson* issue. However, after the parties completed briefing in this matter, [**4] Ronnie died while in prison. The district court appointed his mother, Stephanie Brass, as his personal representative, and she substituted in as a party to this appeal under NRAP 43. Upon substitution, Stephanie filed a motion to abate Ronnie's judgment of conviction due to his death. Stephanie's motion presents a novel issue in Nevada: Should a judgment of conviction be vacated and the criminal prosecution abated when a defendant dies while his or her appeal from the judgment of conviction is pending?

DISCUSSION

There are three general approaches when a criminal defendant dies while his or her appeal from a judgment of conviction is pending: (1) abate the judgment *ab initio*, (2) allow the appeal to be prosecuted, or (3) dismiss the appeal and let the conviction stand. Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R. 4th 189 (1990). We will discuss each approach in turn.

Abatement ab initio

Abatement *ab initio* is the abatement of all proceedings in a prosecution from its inception. United States v. Oberlin, 718 F.2d 894, 895 (9th Cir. 1983). This requires an appeal to be dismissed and the case remanded to the district court with instructions to vacate the judgment and dismiss the indictment or information. [**5] *Id.* Courts that apply the abatement *ab initio* doctrine believe that when death deprives a defendant of the right to an appellate decision, justice prohibits that defendant from standing convicted without a court resolving his or her appeal on its merits. United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977). Many state courts employ this approach. *See* State v. Griffin, 121 Ariz. 538, 592 P.2d 372, 372-73 (Ariz. 1979); Thomas, *supra*, 80 A.L.R. 4th at 191.

Allow the appeal to continue

Some jurisdictions have determined that a defendant who dies while pursuing an appeal from a judgment of conviction is not entitled to have the criminal proceedings abated *ab [*1258] initio;* they instead resolve the appeal on its merits. *See, e.g.*, State v. Makaila, 79 Haw. 40, 897 P.2d 967, 969 (Haw. 1995) (citing cases that follow this approach). These courts have rationalized that "'it is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process.'" State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 414-15 (Wis. 1988) (quoting Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741, 742 n.* (Pa. 1972)). Some courts allow the appeal to continue only if a personal representative is substituted for the deceased appellant; Makaila, 897 P.2d at 972; State v. McGettrick, 31 Ohio St. 3d 138, 31 Ohio B. 296, 509 N.E.2d 378, 382 (Ohio 1987); however, other courts decline to impose this requirement. *See* State v. Jones, 220 Kan. 136, 551 P.2d 801, 803-04 (Kan. 1976); *see also* McDonald, 424 N.W.2d at 415.

Dismiss the appeal and let the conviction stand

Courts that have dismissed the appeal and let [**6] the conviction stand have done so on mootness grounds or out of public policy considerations. *See* State v. Trantolo, 209 Conn. 169, 549 A.2d 1074, 1074 (Conn. 1988) (finding that where an appeal would not affect the interests of a decedent's estate, it was moot); Perry v. State, 575 A.2d 1154, 1156 (Del. 1990) (finding that there was no real party in interest because a cause of action based upon a penal statute did not survive death, thus the appeal was moot); State v. Korsen, 141 Idaho 445, 111 P.3d 130, 135 (Idaho 2005) (holding that the provisions of a judgment of conviction related to custody or incarceration are abated upon the death of the defendant during the pendency of a direct appeal, but provisions of the judgment of conviction pertaining to

payment of court costs, fees, and restitution remain intact because those provisions were meant to compensate the victim); *Whitehouse v. State, 266 Ind. 527, 364 N.E.2d 1015, 1016 (Ind. 1977)* (finding that the right to appeal was personal and exclusive to the defendant and that any civil interests of third parties may be separately litigated).

The appeal shall continue

The abatement *ab initio* and outright dismissal approaches are extreme and have substantial shortcomings. Vacating the judgment and abating the prosecution from its inception undermines the adjudicative process and strips away any solace the victim or the victim's family may have received from the appellant's [**7] conviction. Outright dismissal could prevent a defendant's family from potentially clearing a loved one's name. And both approaches would preclude this court from correcting a deprivation of an individual's constitutional rights. Although the appellant is deceased, rectifying a constitutional error nevertheless benefits society because it decreases the chances that another person would fall victim to the same error.

HN1[↑] We now adopt the position articulated in *Makaila* and allow a deceased criminal defendant's direct appeal to continue upon proper substitution of a personal representative pursuant to *NRAP 43* when justice so requires.[1] This approach allows all parties to present arguments, and then, the court can make an informed decision regarding the validity of the deceased appellant's conviction. Further, a challenge to the regularity of Nevada's criminal process presents a live controversy regardless of the appellant's status because, as stated in *Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741 (Pa. 1972)*, society has an interest in the constitutionality of the criminal process. Therefore, we deny Stephanie's motion for abatement *ab initio* but conclude that, as Ronnie's properly substituted personal representative, she is entitled to continue his appeal. [**8]

Ronnie's appeal

Stephanie asserts that the district court erred in denying Ronnie's *Batson* challenge.[2] In Jermaine's appeal, we concluded [*1259] that a reversal of his judgment of conviction was warranted because the district court's mishandling of Jermaine and Ronnie's *Batson* challenge was intrinsically harmful to the trial's framework. *Brass, 128 Nev. at , 291 P.3d at 149*. Ronnie suffered the same harm as Jermaine and is entitled to the same relief. We recognize that the jury found sufficient evidence to convict Ronnie of the conspiracy, kidnapping, and murder charges.

However, the jury was not properly constituted, and its decision does not override the constitutional error Ronnie suffered. Accordingly, we reverse the judgment of conviction.[3]

/s/ Douglas, J.

Douglas

We concur:

/s/ Gibbons, C.J. [**9]

Gibbons

/s/ Pickering, J.

Pickering

/s/ Hardesty, J.

Hardesty

/s/ Parraguirre, J.

Parraguirre

/s/ Cherry, J.

Cherry

/s/ Saitta, J.

Saitta

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[1] Cf. *State v. Salazar, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996, 1003-04 (N.M. 1997)* (noting that appellate courts may consider "the best interests of [a] decedent's estate, [any] remaining parties, or society" in determining whether an appeal may continue after an appellant's death).

[2] Stephanie raises several other issues on appeal. But, in light of our determination regarding the *Batson* challenge, we need not address these additional issues.

[3] A remand for further proceedings is unnecessary because Ronnie cannot be retried.

△ Caution
As of: February 8, 2018 8:52 PM Z

State v. Benn

Supreme Court of Montana

February 14, 2012, Decided

DA 11-0031

Reporter
2012 MT 33 *; 364 Mont. 153 **; 274 P.3d 47 ***; 2012 Mont. LEXIS 33 ****; 2012 WL 458609

STATE OF MONTANA, Plaintiff and Appellee, v. WESLEY WILLIAM BENN, Defendant and Appellant.

Subsequent History: Released for Publication March 1, 2012.

Judges: [****1] JIM RICE. We Concur: JAMES C. NELSON, PATRICIA COTTER, BETH BAKER, MICHAEL E WHEAT.

Opinion by: JIM RICE

Opinion

[***48] [**153] OPINION AND ORDER

[*P1] Colin M. Stephens, counsel for Appellant Wesley William Benn, filed a notice advising that Benn passed away on July 26, 2011. The State of Montana moved for dismissal, arguing that Benn's death had mooted the appeal. Benn's counsel filed a response opposing the State's motion, and suggesting that this Court's precedent, particularly, our last ruling on this issue in *State v. Holland, 1998 MT 67, 288 Mont. 164, 955 P.2d 1360*, was unclear about the effect of a defendant's death upon the proceeding. We concluded the issue warranted further [**154] consideration and ordered the parties to submit supplemental briefing that analyzed, inter alia, recent decisions by other state courts addressing the issue. That briefing has now been filed.

[*P2] Benn was convicted by jury of sexual intercourse without consent and sexual assault on May 7, 2010. The District Court sentenced Benn to 100 years in the Montana State Prison, with 50 years suspended, for sexual intercourse without consent, and to 50 years in prison, with all 50 years suspended, for sexual assault to run consecutively with the sentence for [****2] sexual intercourse without consent. The court imposed a 25-year parole eligibility restriction, designated Benn a Level II sexual offender, and ordered Benn to pay the costs associated with the victim's therapy. Benn filed a notice of appeal from the judgment on January 18, 2011 and filed his opening brief on June 30, 2011, raising three issues: 1) whether the District Court erred in instructing the jury on the sexual assault charge; 2) whether Benn's trial counsel rendered ineffective assistance by failing to move for a continuance of a hearing when a witness became ill; and 3) whether Benn's lengthy sentence "shocked the conscience" and violated his constitutional rights in light of his failing health. Benn died the following month.

[*P3] In *Holland*, the Defendant died pending his appeal, and the State, as here, moved for dismissal of the appeal. *Holland, ¶¶ 1-2*. We stated we had "consistently held that the death of an accused pending the appeal of a judgment of conviction abates the appeal," although noting that none of our previous cases had "made reference to abating the underlying criminal proceedings." *Holland, ¶¶ 3-4*. We rejected the argument of Defendant's counsel that an appeal [****3] should be decided on the merits following a defendant's death, *Holland, ¶¶ 5, 8*, and concluded that "[i]t further appears to us that the best reasoning is represented by the majority of jurisdictions which hold that a criminal proceeding is abated in its entirety upon the death of the criminal defendant." *Holland, ¶ 8*. As has been explained, "'[i]n the abatement *ab initio* scheme, the judgment is vacated and the indictment is dismissed, but only because the convicted defendant died.'" *Ex parte Estate of Cook, 848 So. 2d 916, 919 (Ala. 2002)* (citation omitted); *see also State v. Carlin, 249 P.3d 752, 756 (Alaska 2011)* (citation omitted) (under abatement *ab initio*, "'all proceedings are permanently abated as to appellant by reason of his death'").

[*P4] The State argues that *Holland* is manifestly

wrong and should be overruled. It argues that the doctrine of abatement *ab initio* embraced in *Holland* originated prior to the recognition of victims' rights, which *Holland* failed to address. It notes that Montana has passed laws [**155] requiring the payment of restitution to victims and that, HN1[↑] in 1998, Article II, Section 28 of the Montana Constitution was amended to add "restitution for victims" as a principle [****4] of the State's criminal justice policy. Montana's legislatively-enacted [***49] correctional and sentencing policy now calls for "restitution, reparation, and restoration to the victim of the offense." Section 46-18-101(2)(c), MCA. The State offers that other state courts have reevaluated their approach to this issue and have overruled prior cases abating criminal proceedings *ab initio*. The State also argues that upon a defendant's death an appeal should be dismissed as moot because it is not possible to grant effective relief to the parties, noting that if a defendant were to prevail, the State could not retry the defendant and obtain a judgment requiring payment of restitution to victims.

[*P5] Benn's counsel discusses and categorizes court decisions demonstrating the different approaches taken by state courts. He "does not specifically advocate for a policy of abatement ab initio," but rather urges the Court to choose a middle path between abatement *ab initio* and dismissal of the appeal as moot. He indicates that Benn's mother has been appointed Benn's personal representative and asks that she be allowed "to substitute in as the party to his appeal and decide whether or not she wants the appeal [****5] to run its course." He notes that M. R. App. P. 25 provides for substitution of a party upon death in a civil case, and argues that the absence of such a procedure in criminal cases violates constitutional protections to equal protection, due process, and access to courts. He argues that Benn's appeal should be allowed to continue to protect his reputation and clear his name, and because Benn's criminal conviction may affect potential civil litigation. While conceding that the third issue raised by Benn's briefing, challenging his sentence, has been mooted, Benn's counsel argues that issues 1 and 2 are still appropriate for review.

[*P6] *Holland* was a brief opinion which, as the State notes, did not address a number of relevant considerations. First, as both parties acknowledge, HN2[↑] a judgment of conviction is presumptively valid. See State v. Smerker, 2006 MT 117, ¶ 36, 332 Mont. 221, 136 P.3d 543 (citation omitted) ("prior convictions are presumed to be valid"); DeVoe v. State, 281 Mont. 356, 364, 935 P.2d 256, 260 (1997) (citation omitted) ("[a] district court's findings and judgment are presumed correct"). Upon conviction, a defendant loses the presumption of innocence and a presumption arises [****6] in favor of the judgment. As the United States Supreme Court has explained, "[a]fter a judgment of conviction has been entered, however, the defendant is no longer protected by the [**156] presumption of innocence." McCoy v. Ct. of Appeals of Wis., Dist. 1, 486 U.S. 429, 436, 108 S. Ct. 1895, 1900, 100 L. Ed. 2d 440 (1988); see also In re Wheat v. State, 907 So. 2d 461, 462 (Ala. 2005) ("A conviction in the circuit court removes the presumption of innocence, and the pendency of an appeal does not restore that presumption."); Carlin, 249 P.3d at 762 ("[A]lmost every court that has discussed the abatement issue has noted that a defendant is no longer presumed innocent after a conviction; rather a convicted defendant is presumed guilty despite the pendency of an appeal, and the conviction is presumed to have been validly obtained."). After conviction, the burden shifts to the defendant to demonstrate that the judgment has been entered in error. See State v. Giddings, 2009 MT 61, ¶ 69, 349 Mont. 347, 208 P.3d 363 ("The appellant bears the burden to establish error by a district court."). Courts considering this issue have reasoned that HN3[↑] abatement of the proceeding *ab initio* upon the death of the defendant is contrary [****7] to the principle that a criminal judgment is presumed to be valid. "[A]utomatic abatement of the entire criminal proceeding *ab initio* . . . disregards entirely the presumptive validity of the conviction . . . ." Surland v. State, 392 Md. 17, 895 A.2d 1034, 1044 (Md. 2006). "[T]here is a strong public policy against the doctrine. Abatement *ab initio* allows a defendant to stand as if he never had been indicted or convicted." State v. Korsen, 141 Idaho 445, 111 P.3d 130, 134 (Idaho 2005).

[*P7] Further, courts have expressed concern about the effect which abatement *ab initio* has upon victims, to whom restitution may have been ordered by the judgment. HN4[↑] "[A]batement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these [restitution] laws by preventing the finality and closure they are designed to provide." Korsen, 111 P.3d at 135; see also State v. Devin, 158 Wn.2d 157, [***50] 142 P.3d 599, 606 (Wash. 2006) (abatement *ab initio* "threatens to deprive victims of restitution that is supposed to compensate them for losses caused by criminals"); Wheat, 907 So. 2d at 463 (citation and emphasis omitted) ("We expect this trend [away from abatement *ab initio*] will continue as the courts and public begin to [****8] appreciate the callous impact such a procedure necessarily has on the

surviving victims of violent crime."). Consequently, "the trend has been away from abating a deceased defendant's conviction *ab initio*." *Korsen, 111 P.3d at 133*.

[*P8] For these reasons, we likewise hold that *HN5*[↑] abatement of the proceeding *ab initio* is an inappropriate resolution of a case when the defendant has died. We conclude that we manifestly erred in *Holland* by failing to consider all of the relevant factors at issue, including the [**157] presumptive validity of the judgment. Further, the law which has developed since *Holland* has challenged the wisdom of the policy of abating criminal proceedings upon a defendant's death. "*HN6*[↑] *[S]tare decisis* does not require that we follow a manifestly wrong decision." *Formicove, Inc. v. Burlington Northern, Inc., 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983)* (citations omitted). *HN7*[↑] We thus overrule *Holland*'s holding that "a criminal proceeding is abated in its entirety upon the death of the criminal defendant." *Holland*, ¶ 8.

[*P9] Turning to the parties' mootness arguments, we have explained that *HN8*[↑] the judicial power of the courts is limited to "'justiciable controversies.'" *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567* [****9] (citing *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881*); *Gateway Opencut Mining Action Group v. Bd. of Co. Comm'rs of Gallatin Co., 2011 MT 198, ¶ 16, 361 Mont. 398, 260 P.3d 133*. "[A] 'controversy,' in the constitutional sense, is one that is 'definite and concrete, touching legal relations of parties having adverse legal interests'; it is 'a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.'" *Plan Helena, ¶ 9* (citation omitted). Further, "[t]he mootness doctrine is closely related to these principles. Under that doctrine, the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Plan Helena, ¶ 10* (citations omitted). Consequently, if "the issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief [****10] or to restore the parties to their original position, then the issue before the court is moot." *Plan Helena, ¶ 10* (citation omitted). We must determine whether a defendant's death during appeal of a criminal judgment is such an "intervening event or change in circumstances" which renders the appeal moot. *See Plan Helena, ¶ 10*.

[*P10] *HN9*[↑] Generally, the relief sought in criminal appeals is individual to the defendant, who challenges the rulings or procedure in the trial court which led to his conviction by verdict or plea, and seeks dismissal of a charge, a new trial, or a new sentence. The defendant's death will often render the requested relief futile, as further proceedings against the defendant upon remand would be impossible. Even if affirmed, a judgment may be rendered ineffectual because supervision or [**158] incarceration of the defendant would no longer be possible or necessary. *See Surland, 895 A.2d at 1042* ("If affirmed, the judgment cannot be executed; a dead defendant obviously cannot be imprisoned or made to satisfy conditions of probation. If reversed, there can be no retrial and no practical benefit to the defendant."). In such cases, this Court would be unable "to grant effective relief [****11] or to restore the parties to their original position," *Plan Helena, ¶ 10*, and the appeal would be subject to dismissal on mootness grounds. While a defendant or his survivors may have an interest in pursuing an appeal for purely personal reasons, such as vindication or reputation, an appeal based solely on such purposes would not constitute a case which is "definite and concrete . . . a real and substantial controversy, admitting of specific relief through decree of [***51] conclusive character," and is subject to dismissal. *Plan Helena, ¶ 9* (internal quotations and citation omitted). Similarly, the mere potential impact of a conviction upon other civil obligations or proceedings does not make an appeal a "definite and concrete" dispute which would satisfy justiciability requirements.

[*P11] However, we recognize that *HN10*[↑] it is possible a criminal appeal could involve issues which are not mooted because of a defendant's death. For example, a restitution condition imposed within a criminal judgment may be enforceable by victims against the defendant's estate. *See Carlin, 249 P.3d at 764* ("Often, there will be a financial component, such as restitution, to a criminal judgment, and the appeal will thus [****12] have financial consequences for the defendant's estate."). A challenge on appeal to the amount of restitution ordered by the sentence, for example, may remain a viable and concrete issue for which this Court would be able to grant effective relief between the parties. The right to appeal a criminal judgment should not be denied as to issues which have not been mooted by the defendant's death.

[*P12] As discussed above, HN11[↑] a judgment is presumed to be valid and, in a criminal appeal, the burden to demonstrate reversible error is on the defendant. Likewise, upon a defendant's death, the task of demonstrating that the appeal has not been mooted will be the burden of the defendant's personal representative. If the defendant's representative establishes that the appeal involves concrete issues beyond those which are individual or personal to the defendant, for which this Court can grant effective relief, then the appeal may proceed. If the defendant's representative fails to carry this burden, the appeal will be dismissed as moot and the judgment will remain as entered. If no party steps forward to be appointed personal representative of the defendant's estate and to pursue the appeal, the appeal [****13] will be subject to dismissal for failure to prosecute. See [**159] Surland, 895 A.2d at 1045; see also Carlin, 249 P.3d at 765. Again, the judgment would remain as entered.

[*P13] The parties have pointed out that M. R. App. P. 25 provides for substitution of a deceased party's personal representative in civil appeals, but makes no provision for substitution in criminal cases. Although Benn's counsel argues that this distinction rises to a constitutional violation, our decision herein does not rest upon M. R. App. P. 25, but upon justiciability principles applicable to all cases, and we therefore need not address the constitutional arguments. The determination that a criminal case is not moot, as discussed above, would be premised upon the identification of concrete interests which survive the defendant. While we cannot anticipate the scope of those interests, in the ordinary course the defendant's personal representative would be authorized to act on the defendant's behalf pursuant to § 72-3-613(22), MCA (a personal representative is authorized to "prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate").

[*P14] There are other potential issues which could arise [****14] with regard to the legal representation of the personal representative in the appeal, both in the circumstance where counsel had been previously retained by the defendant, and in cases where the Appellate Defender had been previously appointed. See Carlin, 249 P.3d at 765. However, those issues have not been raised and briefed here, and we decline to address them. For purposes of this case, we have determined to resolve the merits of the motion to dismiss based upon the arguments made by Defendant's current counsel, and based upon his representations that Defendant's mother has agreed to be appointed personal representative of Defendant's estate.

[*P15] Upon these principles, we turn to the question of whether Benn's appeal is moot. Benn's counsel concedes that Issue 3, challenging Benn's lengthy prison sentence and parole eligibility restriction, has been mooted by Benn's death. The restitution condition of Benn's sentence has not been challenged.[1] Benn's counsel seeks review of Issues 1 and 2. However, both Issues 1 and 2 [***52] are of the kind that are subject to dismissal as moot, as explained in ¶ 10. Issue 1 challenges Benn's sexual assault conviction and Issue 2 alleges [**160] ineffective assistance [****15] of counsel. If Benn were to prevail, either issue would contemplate further trial or postconviction proceedings that are now impossible to undertake, given Benn's death. They are issues which are individual to Benn, for which this Court cannot grant effective relief.

[*P16] We agree with the State's argument that Benn's appeal is moot. Therefore,

[*P17] IT IS HEREBY ORDERED that the motion to dismiss the appeal is GRANTED. The appeal is dismissed with prejudice.

[*P18] The Clerk is directed to mail a true copy hereof to counsel of record herein.

DATED this 14th day of February, 2012.

/s/ JIM RICE

We Concur:

/s/ JAMES C. NELSON

/s/ PATRICIA COTTER

/s/ BETH BAKER

/s/ MICHAEL E WHEAT

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[1] The State offers that the restitution order was subject to challenge on appeal for failure of the sentence to specify the amount to be paid, but that, as a practical matter, Benn was indigent, restitution is unenforceable and a remand to designate the specific amount would be useless. As this issue was not raised on appeal, we decline to address it further.

⚠ Caution
As of: February 8, 2018 8:53 PM Z

Bevel v. Commonwealth

Supreme Court of Virginia

November 4, 2011, Decided

Record Nos. 102246 & 102323

Reporter
282 Va. 468 *; 717 S.E.2d 789 **; 2011 Va. LEXIS 221 ***

JAMES LUTHER BEVEL v. COMMONWEALTH OF VIRGINIA

Prior History: [***1] FROM THE COURT OF APPEALS OF VIRGINIA.

Bevel v. Commonwealth, 2010 Va. App. LEXIS 366 (Va. Ct. App., Sept. 14, 2010)
Bevel v. Commonwealth, 2009 Va. App. LEXIS 598 (Va. Ct. App., Aug. 26, 2009)

Disposition: Record No. 102246 - Vacated. Record No. 102323 - Affirmed.

Counsel: Bonnie H. Hoffman, Deputy Public Defender, for appellant.

Virginia B. Theisen, Senior Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Judges: Present: Kinser, C.J., Lemons, Goodwyn, Millette, Mims, and McClanahan, JJ., and Koontz, S.J. OPINION BY SENIOR JUSTICE LAWRENCE L. KOONTZ, JR.

Opinion by: LAWRENCE L. KOONTZ, JR.

Opinion

[*470] [**789] OPINION BY SENIOR JUSTICE LAWRENCE L. KOONTZ, JR.

In these appeals, we consider what effect the death of a convicted criminal defendant has on a pending appeal and the underlying criminal prosecution. Our consideration of these issues invokes the determination of the extent of the application of the so-called "abatement doctrine" in such instances under the law of Virginia. We have not addressed this issue previously in a reported opinion.

[**790] BACKGROUND

Because the issues raised by these appeals concern only the proceedings that followed the defendant's death, a brief summary of the underlying criminal conviction of the defendant will suffice. On May 21, 2007, James Luther Bevel was indicted by the Grand Jury in the Circuit Court of Loudoun County for [***2] violating *Code § 18.2-366* by having sexual relations with his daughter who was at the time between the ages of 13 and 18. The felony indictment was founded on an allegation made by Bevel's adult daughter that her father had sexual relations with her repeatedly during a two-year period between 1992 and 1994 while they were living in Loudoun County. At trial, the victim testified that these acts of sexual abuse began when she was 6 years old and living in another state. Bevel was convicted in a jury trial on April 10, 2008. The circuit court entered a final sentencing order on October 27, 2008, imposing the jury's verdict of 15 years imprisonment and a fine of $50,000.

The following facts reflect the procedural history of the subsequent appeals in this case. On November 4, 2008, Bevel's counsel, from the Office of the Public Defender, noted an appeal of Bevel's conviction. On December 8, 2008, counsel filed a notice of filing of [*471] transcripts, thus completing the record of the trial for transmission to the Court of Appeals as required by Rule 5A:8(b). The record was duly received by the Court of Appeals, and the appeal was assigned Record Number 2646-08-4 (hereafter, "the merits appeal").

On [***3] December 29, 2008, Bevel's counsel filed a "notice of death" in the circuit court and the Court of Appeals averring that Bevel had died on December 19, 2008. Simultaneously, counsel filed a motion to withdraw as counsel in the Court of Appeals, asserting that as a result of Bevel's death she was unable to proceed with the representation as she "no longer [had]

a client with whom to consult or from whom to take direction regarding this appeal." Within none of these pleadings did counsel request that the prosecution abate. On January 23, 2009, the Court of Appeals denied the motion to withdraw as counsel.

Thereafter, Bevel's counsel filed a "motion to dismiss" in the circuit court. Within the motion, counsel noted that *Code § 8.01-20* allowed, in the discretion of the court, for the abatement of a civil case in which a party had died while the case was pending appeal. Conceding that there were no reported appellate cases in Virginia addressing the abatement or dismissal of a criminal prosecution in such circumstances, counsel noted that in a prior unreported decision the circuit court had ruled that when a defendant dies while his appeal is pending, "[the] conviction must be dismissed." [***4] Counsel further averred that abatement ab initio of criminal convictions when the defendant dies while the conviction is pending appeal is the rule in a majority of other jurisdictions that have considered the question. By an order dated February 26, 2009, the circuit court denied the motion to dismiss.

On March 25, 2009, Bevel's counsel filed a "motion to abate conviction ab initio" in the Court of Appeals. Reciting the same argument for abatement of the entire case as that contained in the motion to dismiss filed in the circuit court, counsel further noted that continuation of the appeal was "inappropriate as counsel for the deceased cannot fulfill . . . her ethical obligations, to wit: counsel cannot communicate with her client and therefore lacks authority either to proceed with the appeal or to withdraw the appeal." She further maintained that the Commonwealth would suffer no prejudice from the abatement of the conviction "as it can neither retry the accused if his appeal succeeds nor impose punishment upon the [*472] accused if his appeal fails." The Commonwealth did not file a response to this motion to abate. On March 27, 2009, the Court of Appeals entered an order suspending the time [***5] for filing the necessary petition for appeal in the merits appeal.[1] On August 26, 2009, the [**791] Court entered an order remanding the case to the circuit court "with instructions to hold a hearing and to abate the prosecution ab initio, unless good cause is shown by the Commonwealth not to do so."

The circuit court complied with the mandate of the Court of Appeals' order by conducting a hearing on September 10, 2009. In support of its contention that the conviction should not abate, the Commonwealth presented testimony from the victim and one of her sisters who also claimed that Bevel had sexually abused her. Both women stated, among other reasons, that they opposed having the conviction abate because acknowledgement by the court of their father's guilt provided them with a sense of closure and validation.

On September 30, 2009, the circuit court entered an order denying the motion to abate Bevel's conviction, finding that the Commonwealth had an interest in maintaining the conviction for the benefit of the victim and as a "powerful symbol" that a guilty verdict represents. The court further concluded that following conviction the presumption of innocence no longer applied and, thus, [***7] abatement should not be favored in such cases. For these reasons, the court ruled that the Commonwealth had established good cause for not abating the conviction.

Bevel's counsel noted an appeal from the judgment of the circuit court finding that there was good cause not to abate the conviction. The Court of Appeals treated the appeal as if it were from a separate [*473] proceeding and assigned it Record Number 2373-09-4 (hereafter, "the good cause appeal"). After receiving briefs and hearing oral argument, the Court issued an unpublished opinion affirming the judgment of the circuit court. *Bevel v. Commonwealth, Record No. 2373-09-4, 2010 Va. App. LEXIS 366 (September 14, 2010)*.

The Court of Appeals first reviewed similar cases in that Court and in the Supreme Court, noting that prior

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[1] Although Bevel's counsel had done all that was required to advance the appeal from the circuit court to the Court of Appeals, unless and until a timely petition for appeal was filed the appeal would not have been perfected, thus, the Court suspended the time for filing the petition in order to give consideration to the motion to abate. *HN1*[↑] In criminal cases in Virginia, other than in cases where a sentence of death is imposed, the awarding of an appeal is discretionary and not a matter of right. *Code § 17.1-406(A)(i)*; see, e.g., *West v. Commonwealth, 43 Va. App. 327, 340-41, 597 S.E.2d 274, 280 (2004)* (holding that a merits review is undertaken only after an appeal is granted and only as to the issues accepted by the Court). As will be explained below, in some jurisdictions abatement ab initio applies only when a convicted defendant dies and at that time he was entitled to an appeal of right or where [***6] a discretionary appeal had already been granted. Although Bevel had not yet perfected his discretionary appeal on the merits of his conviction, we emphasize that our resolution of these appeals does not rest on the fact that his appeal was discretionary, not of right, and had not yet been granted.

dispositions of criminal appeals when the defendant had died were inconsistent, with the appellate court in which the appeal was pending sometimes abating the conviction and other times simply dismissing the appeal and leaving the conviction intact. *2010 Va. App. LEXIS 366, at *9*. Thus, the Court concluded that there was no clear authority in Virginia for routinely abating a criminal conviction ab initio when the defendant dies while pursuing [***8] an appeal. *2010 Va. App. LEXIS 366 at *9*.

The Court then considered whether the circuit court had correctly determined the factors to consider in determining whether there was good cause not to abate the conviction and whether it properly applied the facts from the hearing in determining that Bevel's conviction should not abate. The Court held that these matters were committed to the circuit court's discretion and found no abuse of that discretion. *2010 Va. App. LEXIS 366, at *12*. Accordingly, the Court affirmed the judgment of the circuit court refusing to abate Bevel's conviction. *2010 Va. App. LEXIS 366, at *13*.

On October 14, 2010, the Court of Appeals issued a rule to show cause in the merits appeal, which required Bevel's counsel to show why that appeal should not be dismissed as moot in light of the Court's judgment in the good cause appeal. In her response to the show cause, Bevel's counsel maintained that dismissal of the merits appeal would be premature, as a petition for rehearing en banc was pending in the good cause appeal, and, failing that, she intended to appeal the judgment to this Court. Counsel also contended that the dismissal of the merits appeal would render the appeal of the abatement issue equally [***9] moot, and deny the Court of Appeals sitting en banc and this Court jurisdiction to consider whether abatement had been properly denied. Notably, although counsel referenced an assertion made by the Commonwealth in the circuit court "that Mr. Bevel's death should not [**792] necessarily act as a bar to hearing the [appeal from the underlying conviction] on its merits," she did not retreat from the position first stated in her motion to withdraw as counsel that she could not ethically pursue the appeal, nor did she [*474] contend that the appeal could go forward in its current posture without an appellant or with the substitution of a personal representative of Bevel's estate or other party. Rather, counsel only requested that the merits appeal remain suspended while she pursued the appeal of the abatement issue.

After the petition for rehearing en banc on the good cause issue was denied, Bevel's counsel noted an appeal of that judgment to this Court on November 1, 2010. On November 16, 2010, the Court of Appeals entered an order in the merits appeal dismissing the appeal as moot. Counsel noted an appeal from this judgment as well. By orders dated May 5, 2011, we awarded appeals from the Court of Appeals' [***10] judgments in the good cause appeal (our Record Number 102246) and the merits appeal (our Record Number 102323), consolidating the appeals for briefing and argument.

DISCUSSION

While we have not previously addressed in a reported opinion what effect the death of a criminal defendant has on a conviction or an appeal that is pending at the time of the defendant's death, the issue has arisen in several prior appeals before this Court. As the Court of Appeals noted in its opinion and we acknowledge, there has been a disparity in the treatment of such cases, which have always been disposed of by an unpublished order. Compare, e.g., Isaac v. Commonwealth, Record No. 102208 (March 30, 2011) (firearms possession appeal abated ab initio) and Alaia v. Commonwealth, Record No. 011575 (March 15, 2002) (capital murder appeal abated ab initio) with Barber v. Commonwealth, Record Nos. 930409 & 930492 (November 9, 1993) (capital murder appeal dismissed as moot).

In these previous cases, however, the orders were entered solely in response to a notice of the defendant's death from his counsel or the Commonwealth. The present case presents the first opportunity this Court has been given to address the issue [***11] of abatement after receiving briefs and argument of counsel. Accordingly, we are of opinion that the prior orders in which abatement was applied have no precedential value. Cf. *Sheets v. Castle, 263 Va. 407, 410-12, 559 S.E.2d 616, 618-19 (2002)* (holding that *HN2*[↑] with respect to unpublished order denying a petition for appeal, a clear statement of the grounds for the denial "is indispensable in assessing its potential applicability in future cases" and that "unless the grounds upon which the [*475] [denial] is based [are] discernable from the four corners of the . . . order, the denial carries no precedential value").

We begin by first considering the historical context of the abatement doctrine. We further consider how it has been applied to criminal prosecutions in other jurisdictions.

HN3[↑] Abatement is the dismissal or discontinuance of a legal proceeding "for a reason unrelated to the

merits of the claim." Black's Law Dictionary 3 (9th ed. 2009). Abatement can occur in civil cases for a variety of reasons, see 1 Am. Jur. 2d Abatement, Survival, and Revival §1 (2006), but in criminal prosecutions abatement traditionally has been limited to circumstances where the defendant dies prior to a final resolution [***12] of the case in the trial court. It is clear that when a defendant dies before the trial court has confirmed a verdict by a final order of judgment, the death of the defendant causes the prosecution to abate. *United States v. Lay, 456 F. Supp. 2d 869, 874 (S.D. Tex. 2006)* (citing *United States v. Asset, 990 F.2d 208, 211 (5th Cir. 1993)*); see also *United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983)*. Obviously, subsequent to the death of the defendant there is no one upon whom the trial court can impose a final judgment. When final judgment of conviction has been entered in the trial court, however, there is less certainty as to the effect of the death of the defendant at the time he was pursuing, or at least had the opportunity to pursue, a direct appeal of the conviction.

The origin of the abatement doctrine as applied to criminal appellate cases is unclear, with little or no evidence of its application prior to the late nineteenth century. See Timothy A. Razel, Note, Dying to Get Away With It: How The Abatement Doctrine [**793] Thwarts Justice-And What Should Be Done Instead, *75 Fordham L. Rev. 2193, 2198 (2007)*. These early decisions were occasionally quite terse and provide little [***13] insight into the reasons the courts elected to abate a case or not, or even as to what aspect of the case was being abated - the appeal only or the entire prosecution. See, e.g., *List v. Pennsylvania, 131 U.S. 396, 396, 9 S. Ct. 794, 33 L. Ed. 222 (1888)* (per curiam) (dismissing a writ of error because "this cause has abated"); *O'Sullivan v. People, 144 Ill. 604, 32 N.E. 192, 194 (Ill. 1892)* (per curiam) (denying motion to consider an appeal and render judgment nunc pro tunc because "the writ of error abated upon the death" of the defendant); *March v. State, 5 Tex. Ct. App. 450, 456 (Tex. Crim. App. 1879)* (granting a "motion to abate the proceedings").

[*476] The modern statement of the abatement doctrine is found in *Durham v. United States, 401 U.S. 481, 483, 91 S. Ct. 858, 28 L. Ed. 2d 200 (1971)*(per curiam), in which the United States Supreme Court held that *HN4*[↑] "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception." The defendant in Durham died after filing a petition for a writ of certiorari. The Supreme Court granted the defendant's writ, vacated the judgment of the Ninth Circuit affirming his conviction, and remanded the case to the district court with instructions to [***14] dismiss the indictment. Id. Justice Blackmun dissented, contending "the situation is not one where the decedent possessed, and had exercised, a right of appeal." *Id. at 484* (Blackmun, J., dissenting). Thus, rather than abating the entire proceeding, Justice Blackmun contended that the proper remedy was to "merely dismiss the decedent's petition for certiorari," noting further that "[i]f, by chance, the suggestion of death has some consequence upon the survivor rights of a third party (a fact not apparent to this Court), the third party so affected is free to make his own timely suggestion of death to the court of appeals." *Id. at 484-85*. Just five years later in *Dove v. United States, 423 U.S. 325, 325, 96 S. Ct. 579, 46 L. Ed. 2d 531 (1976)* (per curiam), the Supreme Court, with only Justice White dissenting, overruled *Durham*. In a concise opinion, the Court denied Dove's petition for certiorari because he had died before the petition was heard, overruling Durham "[t]o the extent that [it] may be inconsistent with this ruling." Id. Subsequently, however, the federal circuit courts have concluded that Dove did not abrogate the abatement doctrine entirely for criminal cases, but only for those cases that had concluded [***15] their initial appeals. See, e.g., *United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)* ("We do not believe that the Court's cryptic statement in Dove was meant to alter the longstanding and unanimous view of the lower federal courts that the death of an appellant during the pendency of his appeal of right from a criminal conviction abates the entire course of the proceedings brought against him").

Nonetheless, the circuits are divided on how the abatement doctrine applies in specific cases, such as whether an order of restitution abates along with other aspects of the conviction. Compare *United States v. Christopher, 273 F.3d 294, 298-99 (3d Cir. 2001)* (holding restitution order does not abate); *United States v. Dudley, 739 F.2d 175, 179-80 (4th Cir. 1984)* (same), with *United States v. Rich, 603 F.3d 722, 728-31 [*477] (9th Cir. 2010)* (holding restitution order does abate); *United States v. Estate of Parsons, 367 F.3d 409, 415 (5th Cir. 2004)* (en banc) (same); *United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997)* (same); see also John H. Derrick, Annotation, Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal Conviction, 80 A.L.R. Fed. 446 (1986 [***16] & Supp. 2011).

Among the states, the treatment of the abatement

doctrine is even more multifarious. Although the issue is most frequently framed as being a choice between abatement ab initio of the entire prosecution or dismissal of the appeal only, there are at least seven categories of policies on abatement: (1) abatement ab initio when the defendant dies pending resolution of his appeal; (2) abatement ab initio when the appeal at issue is an appeal of right; (3) abatement ab initio when the court has granted a discretionary application for review, thereafter treating the case as if the appellant had been given an appeal [**794] of right; (4) the case is not abated and the appeal may be prosecuted; (5) the case is not abated ab initio, but the appeal may not be prosecuted; (6) a personal representative may be substituted to avoid abatement ab initio; or, (7) the appeal abates without addressing whether the proceedings are abated ab initio. *United States v. Rorie, 58 M.J. 399, 402 (C.A.A.F. 2003)* (citing Tim A. Thomas, Annotation, Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction - Modern Cases, 80 A.L.R.4th 189 (1990 & Supp. 2002)). Thus, although most courts [***17] and commentators agree that abatement in some form is the majority position in the federal and state courts, see, e.g., *Surland v. State, 392 Md. 17, 895 A.2d 1034, 1046 (Md. 2006)* (Greene, J., dissenting); *Ex parte Estate of Cook, 848 So. 2d 916, 918 (Ala. 2002)*, it is also true that a modern trend has been to limit or modify the application of the doctrine, or dispense with it entirely, though this remains a minority view. See, e.g., *State v. Carlin, 249 P.3d 752, 759-60 (Alaska 2011)*; *Surland, 895 A.2d at 1039*; *State v. Korsen, 141 Idaho 445, 111 P.3d 130, 133 (Idaho 2005)*.

Given the diversity of opinion in the application of the abatement doctrine, it is perhaps not surprising that the doctrine's legal underpinnings are not well established. As one court has observed, "[d]espite the common acknowledgment that abatement ab initio is a well-established and oft-followed principle . . . few courts have plainly articulated the rationale behind the doctrine." *Parsons, 367 F.3d at 413*. This is so, apparently, because the abatement doctrine, at [*478] least as applied to criminal prosecutions "is largely court-created." *Id. at 414*. It does not appear that abatement of a criminal case is addressed by statute in any jurisdiction [***18] in the United States, see *Razel, supra, at 2197-98*, nor is the ability to challenge abatement addressed by any statutory scheme providing for victim's rights. Douglas E. Beloof, Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure, *56 Cath. U.L. Rev. 1135, 1159 (2007)*.

Against this background, we now turn to the issues raised in these appeals.[2] The thrust of Bevel's counsel contentions is that under the abatement doctrine, "death [of the defendant] during the pendency of a direct appeal necessitates abatement of the conviction ab initio." The Commonwealth responds that the abatement doctrine is founded upon a false premise that a convicted defendant who dies while his appeal is pending would have ultimately prevailed and been exonerated. The Commonwealth contends that the modern trend in jurisdictions that have examined the issue is to dismiss the appeal, leaving the conviction intact, because on appeal there is no presumption of innocence and the conviction is presumed to be correct.

The Commonwealth further contends that abatement "is also outdated because it rests on the premise that criminal convictions and sentences serve only to punish the convicted." The modern trend, according to the Commonwealth, recognizes "that the criminal justice system does not only serve to punish, but it also serves to protect and compensate crime victims." We believe that the Commonwealth's contentions have merit.

Reviewing the authorities cited above, it seems clear that *HN5*[↑] the determination of various courts whether to abate a conviction ab initio when the defendant has died while his appeal was pending, to merely dismiss the appeal and leave the [***20] conviction intact, or to apply some intermediate solution, rests largely on the individual court's consideration of the purpose of the punishment imposed on the defendant, the interest of society in acknowledging the fact of his [*479] offense, and the potential effect on the victim or victims of the offense in erasing that fact. We are of opinion, however, that such policy determinations fall outside the scope of the authority granted [**795] to the appellate courts of this Commonwealth by the Virginia Constitution and by

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[2] For the reasons that will become apparent, we do not reach the assertions of Bevel's counsel in the good cause appeal that the Court of Appeals erred in creating a "good cause" exception [***19] to the abatement doctrine and remanding the case to the circuit court for a hearing whether good cause existed to deny the motion to abate. The Court of Appeals stated in its opinion that Bevel failed to present argument on this issue and, thus, had waived this issue on appeal. *Bevel, 2010 Va. App. LEXIS 366, at *7 n.4*. Although the Court of Appeals went on to review and approve the circuit court's application of the "good cause" exception, *2010 Va. App. LEXIS 366, at *13*, Bevel's counsel did not assign error to the Court's determination that the issue was waived.

statute.

Likewise, to the extent that such authority might derive from the common law of England as applicable in Virginia at the time of the founding of the Jamestown colony in 1607, *Code §§ 1-200* and *-201*,[3] we find no support for the notion that a criminal proceeding necessarily would abate following conviction if the defendant were to die while he might yet have obtained relief through a writ of error or some other process equivalent to a direct appeal. To the contrary, the authorities are consistent in affirming that at common law an attainder of felony would not be affected by the death of the defendant, but that his executor or heirs could pursue a writ of error in his stead. [***21] See, e.g., 4 William Blackstone, Commentaries *391-92; 2 William Hawkins, Pleas of the Crown 654 (John Curwood, ed., 8th ed. 1824). The rule appears to derive from the case of Marsh and his Wife, found in the reports of Sir George Croke for the Easter Term of the Queen's Bench in the 33rd (1590-91) and 34th (1591-92) years of the reign of Queen Elizabeth I. See Marsh & his Wife, (1790) 78 Eng. Rep. 481 (Q.B.); Cro. Eliz. 225 (holding that "[a]n executor may bring a writ of error to reverse the outlawry for felony of his testator"), continued sub nom. Marshe's Case, (1790) 78 Eng. Rep. 528 (Q.B.); Cro. Eliz. 273 (same).

We conclude that *HN6*[↑] if it is to be the policy in Virginia that a criminal conviction necessarily will abate upon the death of the defendant while an appeal is pending and whether there should be a good cause exception in that policy, the adoption of such a policy and the designation of how and in what court such a determination should be made is more appropriately decided by the legislature, not [*480] the courts. See, e.g., *Uniwest Constr., Inc. v. Amtech Elevator Servs., 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010)*("The public policy of the Commonwealth is determined by the General Assembly [because] it is the responsibility of the legislature, not the judiciary . . . to strike the appropriate balance between competing interests.")(internal quotation marks omitted). For these reasons, we hold that the Court of Appeals erred in applying the abatement doctrine to Bevel's criminal appeal. In light of this holding, the remainder of Bevel's counsel's assignments of error relating to [***23] the proceedings in the circuit court and the subsequent review of those proceedings in the Court of Appeals are now moot. Accordingly, we will vacate the judgment of the Court of Appeals in Record Number 102246 (the good cause appeal).

We now turn to the sole issue raised by Bevel's counsel in the merits appeal, which is whether the Court of Appeals erred in dismissing the appeal of Bevel's conviction on its merits as moot on account of his death. As we have already indicated, Bevel's counsel's objection to the dismissal of the appeal by the Court of Appeals was not based upon any contention that the appeal could go forward, but rather was based only on the concern that dismissal of the underlying appeal would result in the Court of Appeals and this Court losing jurisdiction over the issue of abatement. Having resolved the abatement issue, we conclude that under the facts and procedural posture of this case, proceeding on the merits would be a pointless exercise, as there is no party seeking to prosecute the appeal. Accordingly, we will affirm the judgment of the Court of Appeals in Record Number 102323 (the merits appeal) dismissing Bevel's appeal of his conviction as moot.

In doing [***24] so, however, we expressly do not address whether in all cases an appeal on the merits of a criminal conviction would become moot on the death of the defendant. It is conceivable that in a case where a criminal [**796] conviction could have a significant negative impact on a deceased defendant's estate or the rights of his heirs or another party, the appeal could be prosecuted by a substituted party as was allowed under the common law of England before 1607. But, as neither Bevel's counsel nor the Commonwealth has argued for such a remedy, or even averred that it would be practical in this particular case, we leave that issue to another day.

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[3] As we recently explained in construing and applying *Code §§ 1-200* and *-201*,

> our adoption of English common law, and the rights and benefits of all writs in aid of English common law, ends in 1607 upon the establishment of the first permanent English settlement in America, Jamestown. From that time forward, the common law we recognize is that which has been developed in Virginia. More simply stated, English common law and writs in aid of it prior to the settlement of Jamestown (insofar as the same are consistent with the *Bill of Rights* and Constitution of the Commonwealth [***22] and the Acts of Assembly), together with common law developed in Virginia thereafter, constitute the corpus of common law that guides our analysis.

Commonwealth v. Morris, 281 Va. 70, 82, 705 S.E.2d 503, 508-09 (2011).

[*481] CONCLUSION

For these reasons, we will vacate the judgment of the Court of Appeals applying the abatement doctrine. We will affirm the judgment of the Court of Appeals, under the specific facts and procedural posture of this case, holding that Bevel's death renders the appeal of his conviction moot.

Record No. 102246 - Vacated.

Record No. 102323 - Affirmed.

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State v. Carlin

Supreme Court of Alaska

March 25, 2011, Decided

Supreme Court Nos. S-13385/13573 (Consolidated), Court of Appeals No. A-10155, Court of Appeals No. A-09659, No. 6547

Reporter
249 P.3d 752 *; 2011 Alas. LEXIS 18 **

STATE OF ALASKA, Petitioner, v. JOHN T. CARLIN III, Respondent. JIMMIE DALE, Petitioner, v. STATE OF ALASKA, Respondent.

Subsequent History: Decision reached on appeal by *Estate of Carlin v. State, 2015 Alas. App. LEXIS 5 (Alaska Ct. App., Jan. 21, 2015)*

Prior History: [**1] Petition for Hearing in File No. S-13385 from the Court of Appeals of the State of Alaska, on appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge. Petition for Hearing in File No. S-13573 from the Court of Appeals of the State of Alaska, on appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge. Superior Court No. 3AN-06-10139 CR. Superior Court No. 3PA-05-02725 CR.

Dale v. State, 209 P.3d 1038, 2009 Alas. App. LEXIS 90 (Alaska Ct. App., 2009)
Linehan v. State, 224 P.3d 126, 2010 Alas. App. LEXIS 14 (Alaska Ct. App., 2010)

Counsel: Diane L. Wendlandt, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Daniel S. Sullivan, Attorney General, Juneau, for State of Alaska.

Marjorie Allard, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, as amicus curiae and previous counsel for Respondent Carlin.

Christine S. Schleuss, Law Office of Christine Schleuss, Anchorage, for Petitioner Dale.

Allen M. Bailey, Law Offices of Allen M. Bailey, Anchorage, for Amici Curiae National Crime Victim Law Institute and Alaska Office of Victims' Rights.

Judges: Before: Carpeneti, Chief Justice, Fabe, Winfree, Christen, and Stowers, Justices.

Opinion by: FABE

Opinion

[*754] FABE, Justice.

I. INTRODUCTION

We consolidated these two cases to resolve the following question: What is the effect [**2] of the death of a criminal defendant while an appeal is pending? John Carlin III was convicted of first-degree murder. He appealed his conviction to the court of appeals and died before the opening brief was filed. Jimmie Dale was convicted of several crimes arising out of a drunk driving incident. He appealed to the court of appeals, which affirmed his conviction. He then filed a petition for hearing before this court, and we granted the petition. But after filing his opening brief, Dale died. In each case, the defendant's attorney filed a motion to dismiss the appeal and vacate the conviction pursuant to the rule of abatement we adopted in *Hartwell v. State.* [1]

Because of changed conditions, including increased recognition of the rights of crime victims and rejection of abatement by some state courts, we now overrule *Hartwell*. We hold that *HN1*[↑] when a criminal defendant dies after filing an appeal, or a petition for hearing which has been granted, the defendant's conviction will stand unless [**3] the defendant's personal representative elects to continue the appeal.

[1] *423 P.2d 282, 284 (Alaska 1967)* (holding that the death of a criminal defendant while a conviction is on appeal will permanently abate all criminal proceedings and nullify the defendant's conviction).

II. FACTS AND PROCEEDINGS

A. *State v. Carlin*

In September 2006 John Carlin III was indicted on a charge of first-degree murder for killing Kent Leppink a decade earlier. A jury found Carlin guilty, and the trial court sentenced Carlin to serve 99 years in prison. In a separate trial following his conviction, Carlin's co-defendant, Mechele Linehan, was also convicted of first-degree murder on the theory that she aided and abetted Carlin. [2] [*755] Carlin appealed his conviction, arguing that the superior court should not have admitted certain hearsay statements made by Leppink and Linehan at his trial. Among the evidence admitted by the court was a letter written by Leppink shortly before his death in which he stated that if he died under mysterious circumstances, Linehan and either Carlin or another of Linehan's boyfriends would probably be the ones responsible.

On October 27, 2008, before the opening brief in his appeal was filed, Carlin was murdered in prison. Carlin's [**4] appellate attorney from the Alaska Public Defender Agency moved to dismiss the appeal and vacate Carlin's criminal conviction under the doctrine of abatement *ab initio* that we adopted in *Hartwell v. State*. [3] The State opposed the motion, arguing in the alternative that (1) *Hartwell* should not apply because the abatement of Carlin's conviction could have collateral consequences for a retrial of Linehan should she be successful in appealing her conviction for aiding and abetting Carlin; or (2) the doctrine of abatement announced in *Hartwell* should be abandoned. The court of appeals rejected the State's arguments and granted the motion to dismiss the appeal and abate Carlin's conviction.

The State petitioned for a hearing, requesting that we revisit our ruling in *Hartwell*. We granted the petition and permitted the Public Defender Agency to file an amicus brief in light of its expressed concern about the propriety of continuing its representation after Carlin's death. [**5] We also invited the Office of Victims' Rights to participate as amicus curiae. After the State filed its opening brief, but before any responsive brief was filed, the court of appeals reversed Linehan's conviction, holding that it was error to admit Leppink's accusatory letter "from the grave." [4]

B. *Dale v. State*

On October 4, 2005, Jimmie Dale drove his truck off the road and down a 100-foot embankment, seriously injuring his two female passengers. [5] A sergeant of the Alaska State Troopers, who responded to the scene, learned that Dale had left on foot. The sergeant located Dale a short distance away and believed that Dale had been drinking. [6] Dale was taken to a hospital along with his passengers, [7] and there a trooper directed the staff to take a blood sample from Dale without first obtaining a warrant. The test, taken more than three hours after the accident, revealed a blood-alcohol content between 0.07 and 0.08. [8]

Dale was charged with driving under the influence, driving with a suspended license, two counts of assault in the first degree, two counts of assault in the [**6] third degree, and failure to remain at the scene and render assistance after an accident causing injury. Dale moved to suppress the results of the blood test on *Fourth Amendment* grounds, [9] arguing that the warrantless blood draw was not supported by exigent circumstances. The superior court denied Dale's motion, and a jury convicted him of all charges. [10] He was sentenced to 23 years and 40 days in prison. The court of appeals affirmed. [11]

Dale then filed a petition for hearing, raising the issue of whether exigent circumstances always exist in DUI cases. We granted the petition and set a briefing schedule. After Dale filed his opening brief, but before

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[2] *But see* Linehan v. State, 224 P.3d 126, 130, 150 (Alaska App. 2010) (reversing Linehan's conviction and concluding that Linehan is entitled to a new trial).

[3] 423 P.2d at 284. HN2[↑] "Abatement" is defined as "[t]he act of eliminating or nullifying" or "[t]he suspension or defeat of a pending action for a reason unrelated to the merits of the claim." BLACK'S LAW DICTIONARY 3 (9th ed. 2009).

[4] Linehan, 224 P.3d at 130-43, 150.

[5] Dale v. State, 209 P.3d 1038, 1039 (Alaska App. 2009).

[6] *Id.*

[7] *Id.*

[8] Id. at 1039, 1040.

[9] Id. at 1040.

[10] *Id.*

[11] Id. at 1044.

the State filed its opposition, Dale died in prison. The State moved to dismiss the appeal, leaving intact the decision by the court of appeals. Dale's counsel requested [*756] that the appeal continue unless Dale's conviction was abated. We stayed further briefing on the merits of Dale's petition and ordered full briefing on the "abatement issue presented by Dale's death," inviting the National Crime Victim Law Institute and the Alaska Public Defender Agency to submit amicus briefs. In addition, we consolidated [**7] the matter with *State v. Carlin* for argument, consideration, and decision.

III. STANDARD OF REVIEW

In *State v. Carlin*, the State challenges the decision by the court of appeals to dismiss Carlin's appeal and abate his criminal prosecution under the common law doctrine of abatement. HN3[↑] We apply our independent judgment to questions of law, such as the formulation and scope of common law rules. [12] In *Dale v. State*, the issue of abatement was first raised in a motion before this court, so there is no decision by a lower court to review. HN4[↑] We will overturn one of our prior decisions only when we are "clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." [13]

IV. DISCUSSION

A. *Hartwell v. State*[14]

In 1967 we addressed the following question: "[W]hat effect does the death of the appellant, pending [**8] disposition of his appeal from a criminal conviction, have on the proceedings." [15] Robert Hartwell was found guilty by a jury of the crime of incest and sentenced to seven years in prison with five years suspended. [16] He appealed his conviction and sentence to this court but died before his appeal was heard. We requested briefing from the parties on the effect of Hartwell's death. The State submitted a three-page brief requesting that we abate Hartwell's criminal proceedings, a position different from the one it takes today, and describing abatement *ab initio* as the "universal rule" absent a statute to the contrary. Hartwell's attorney submitted a one-page letter requesting that we resolve the appeal, noting that Hartwell's "reputation while alive is important to his three remaining children."

We adopted the doctrine of abatement *ab initio*, holding that "all proceedings are permanently abated as to appellant by reason of his death pending the appeal." [17] We gave three reasons for our holding: (1) "A majority of the federal and state courts where the question has arisen" had adopted the doctrine of abatement *ab initio*; (2) maintaining the conviction did not serve either [**9] of the two "underlying principles of penal administration in Alaska[:] . . . reformation and protection of the public"; and (3) "[d]eath ha[d] removed the appellant from the jurisdiction of this court." [18]

When *Hartwell* was decided, a criminal defendant had a right to appeal his conviction and sentence to the supreme court. [19] In 1980, the Alaska Legislature created the court of appeals to hear criminal appeals. Now HN5[↑] criminal defendants can appeal to the court of appeals as a matter of right, rather than to the supreme court. [20] Supreme court review of decisions by the court of appeals is discretionary, thus leaving criminal defendants with only one appeal as a matter of right. [21]

Carlin, like Hartwell, died while his appeal as a matter of right was pending. Therefore, [*757] our ruling in *Hartwell* controls in *State v. Carlin* unless *Hartwell* is overruled.

In contrast, Dale's appeal to the court of appeals was resolved, and his conviction affirmed. Dale died after we

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[12] *Jacob v. State, Dep't of Health & Soc. Servs., Office of Children's Servs., 177 P.3d 1181, 1184 (Alaska 2008)*.

[13] *Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1175-76 (Alaska 1993)* (quoting *State v. Dunlop, 721 P.2d 604, 610 (Alaska 1986)*).

[14] *423 P.2d 282 (Alaska 1967)*.

[15] *Id. at 283*.

[16] *Id.*

[17] *Id. at 284*.

[18] *Id. at 283-84* (citations omitted).

[19] Former *AS 22.05.010* (1976), *repealed by* ch. 12, § 2, SLA 1980.

[20] *AS 22.07.010, .020, enacted by* ch. 12, § 1, SLA 1980.

[21] *AS 22.05.010*.

agreed to hear Dale's *discretionary* appeal. For [**10] this reason, the State argues that *Hartwell* is not controlling. It urges us to follow the "vast majority of courts that have addressed this issue" and have held that abatement *ab initio* does not apply when a criminal defendant dies during discretionary review. [22] But as Dale's counsel notes, the cases cited by the State involve criminal defendants who died before the higher court acted on their request for discretionary review. There is a substantive difference between those cases and cases where, as here, the court has *granted* the request for discretionary review prior to the defendant's death.

In one case directly on point, *People v. Mazzone*, the Illinois Supreme Court applied the doctrine of abatement *ab initio* to a criminal defendant whose petition for discretionary review had been granted, but who died before the appeal was completed. [23] The court found "the matter [to be] closely analogous to initial appeals as of right, and the reasons justifying abatement [a]*b initio* there apply equally here." [24] The State seeks to distinguish *Mazzone* by arguing that unlike in Illinois, where "the discretionary nature of the petition process ends with the grant of the petition," in Alaska we retain the right to dismiss a petition as improvidently granted. This attempted distinction lacks merit: in Illinois, as in Alaska, the supreme court can dismiss a petition as improvidently granted. [25]

While Dale, unlike Carlin, already had the benefit of appellate review, in granting his petition [**12] we decided that his case was one that warranted further appellate review. [26] By granting Dale's petition for hearing, we gave Dale a right to present his appeal. Once that right has been conferred, there is no obvious basis for distinguishing between Dale's position and that of a criminal defendant who has filed an appeal as a matter of right. Thus, *Hartwell*, while not strictly controlling, is persuasive and should be applied unless it is overruled. We now turn to the question of whether there are grounds for overruling *Hartwell* before examining whether such a departure from the doctrine of abatement *ab initio* is warranted and what alternatives are available.

B. Are There Grounds For Overruling *Hartwell*

The State urges us to overrule our decision in *Hartwell*. HN6[↑] Stare decisis compels us to approach overruling one of our prior decisions carefully. "[S]tare decisis is a practical, flexible command that balances our community's competing interests in the stability of legal norms and the need to adapt [**13] those norms to society's changing demands." [27] We will overrule a decision only when convinced: (1) "that the rule was originally erroneous or is no longer sound because of changed conditions," and (2) "that more good than harm would result from a [*758] departure from precedent." [28] We conclude that both criteria are met here.

1. Is *Hartwell* no longer sound because of changed conditions?

The State argues that changes in the past 40 years since *Hartwell* was decided render it no longer sound. These changes include the constitutional recognition of victims' rights as part of the criminal justice process and the growing number of states that have rejected abatement.

HN7[↑] To support a departure from precedent on the grounds of "changed conditions," a party must show that "related principles of law have so far developed as to

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[22] See Surland v. State, 392 Md. 17, 895 A.2d 1034, 1035 (Md. 2006) ("The law throughout the country seems clear, and by now mostly undisputed, that, if the defendant's conviction has already been affirmed on direct appeal and the death occurs while the case is pending further discretionary review by a higher court, such as on *certiorari*, the proper course is to dismiss the discretionary appellate proceeding and leave the existing judgment, as affirmed, intact."); *see also* Dove v. United States, 423 U.S. 325, 96 S. Ct. 579, 46 L. Ed. 2d 531 (1976) (dismissing petition for writ of certiorari in criminal case upon notice that petitioner had [**11] died); United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977) (interpreting *Dove* as rejecting doctrine of abatement *ab initio* only for cases in which a petition for writ of certiorari was pending).

[23] 74 Ill. 2d 44, 383 N.E.2d 947, 950, 23 Ill. Dec. 76 (Ill. 1978).

[24] *Id.*

[25] See, e.g., People v. Thompson, 587 N.E.2d 484, 167 Ill. Dec. 215 (Ill. 1992).

[26] In 2009 we granted only six of 88 petitions for hearing. ALASKA COURT SYSTEM, ANNUAL STATISTICAL REPORT 2009, at 3, 6 (2010), *available at* http://www.courts.alaska.gov/reports/annualrep-fy09.pdf.

[27] Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1175 (Alaska 1993).

[28] Id. at 1175-76 (quoting State v. Dunlop, 721 P.2d 604, 610 (Alaska 1986)).

have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application." [29]

a. [14] Recognition of rights of crime victims**

Both the State, and the National Crime Victim Law Institute and Alaska Office of Victims' Rights in their amicus briefs, note the "dramatic shift" in the 40 years since *Hartwell* was decided "to provide substantial constitutional and statutory rights to crime victims during all phases of the criminal justice process." This shift has taken place throughout the country. [30] The State and amici argue that the constitutional and statutory rights of crime victims, increasingly recognized since *Hartwell*, constitute a changed condition that supports reconsideration of *Hartwell* and abandonment of the doctrine of abatement *ab initio*.

In Alaska, the rights of crime victims were first given legal recognition in 1984, when the Alaska legislature added a statutory provision enumerating those rights. [31] In the same act, the legislature directed judges and parole boards to consider the [**15] interests of crime victims when imposing felony sentences or considering the release of prisoners. [32] Five years later, the legislature passed a comprehensive Alaska Crime Victims' Rights Act. [33] The Act codified the rights of crime victims not only to be informed of criminal proceedings but to participate in sentencing and parole decisions. [34] The legislature has continued to promulgate and refine statutes concerning the rights of crime victims, for example defining a restitution order as a "civil judgment," thus allowing a victim to use civil collection procedures to enforce a restitution order. [35]

In 1994 Alaska's voters overwhelmingly approved the Rights of Victims of Crime Amendment to the Alaska Constitution. [36] The amendment added *article I, section 24*, [**16] providing that victims of crimes have "the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process" and "the right to restitution from the accused," among other rights. [37] The amendment also revised *article I, section 12*, which enumerates the goals of the criminal justice system. Prior to the amendment, this section provided that "[p]enal administration shall be based on the principle [*759] of reformation and *upon* the need for protecting the public," [38] a statement on which we relied in *Hartwell*. [39] The 1994 amendment expanded the goals of "[c]riminal administration" to include "community condemnation of the offender, the rights of victims of crimes, [and] restitution from the offender." [40]

Hartwell's assertion that the "underlying principles of penal administration in Alaska are reformation and protection of the public" is thus no longer complete. Alaska's statutes and its constitution now also require the criminal justice [**17] system to accommodate the rights of crime victims. The abatement of criminal convictions has important implications for these rights. Therefore, the expansion and codification of victims' rights since *Hartwell* provides the changed conditions needed to satisfy the first element of the test for overruling precedent.

b. Rejection of the abatement *ab initio* doctrine by some state courts

While the doctrine of abatement *ab initio* was the majority rule in federal and state courts when *Hartwell* was decided, the State argues that "a steadily growing

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[29] *Id.* (quoting *Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).*

[30] According to the amici, more than thirty states have, like Alaska, amended their constitutions to explicitly provide crime victims with rights and protections in criminal justice proceedings, and every single state and the federal government grant statutory rights to crime victims.

[31] Ch. 154, § 4, SLA 1984 (codified at *AS 12.61.010(a)*). These rights included the right to be notified of criminal proceedings, the right to be protected from harm and threats, the right to be informed of the procedure to obtain restitution, and the right to immediate medical assistance.

[32] Ch. 154, §§ 1-2, 5-6, 8-9, SLA 1984.

[33] Ch. 59, SLA 1989.

[34] *Id.* §§ 4-5, 8, 14, 21, 27-28.

[35] *See* ch. 92, SLA 2001; ch. 23, SLA 2002; ch. 17, SLA 2004.

[36] *See http://www.elections.alaska.gov/doc/forms/H28.pdf*

[37] *Alaska Const. art. I, § 24.*

[38] *Alaska Const. art. I, § 12* (amended 1994).

[39] *Hartwell v. State, 423 P.2d 282, 284 (Alaska 1967).*

[40] *Alaska Const. art. I, § 12.*

number of state courts have rejected the doctrine."[41] According to the State, these state courts have pointed to the unfairness to crime victims of abating criminal convictions and the doctrine's inconsistency with the presumption of guilt following a jury conviction. Further, the State suggests that "more states have rejected abatement to some degree (22 states) than have retained it fully intact (19 states and the District of Columbia)."

The Public Defender Agency responds that "[a]lthough a few state courts have moved away from the majority rule in the last few decades, a far greater number of state courts have directly affirmed their continued adherence to the doctrine during this same time." [42] The Public Defender Agency points out that two states, Montana and Mississippi, have actually adopted abatement *ab initio* for the first time in the last few decades. [43] By the Public Defender Agency's count, a "majority (or near majority) of state courts that have addressed the abatement issue continue to apply a strict rule of abatement *ab initio*."

The State and the Public Defender Agency's primary source of disagreement is in how to group the approaches to abatement taken by each state. [44] The Public Defender Agency separates states into four categories: (1) those that dismiss the appeal and abate the criminal conviction (21 states and the District [**20] of Columbia); (2) those that dismiss the appeal and do not abate the criminal [*760] conviction (five states); (3) those that allow the appeal to continue in certain circumstances but otherwise abate the criminal conviction (seven states); and (4) those that allow the appeal to continue in certain circumstances but otherwise do not abate the criminal conviction (four states). Under the Public Defender Agency's analysis, a solid majority of the states that have addressed the issue (21 of 37) abate criminal convictions in all instances and an additional seven states abate criminal convictions in some instances. The State, in contrast, argues that all approaches other than a strict application of the abatement *ab initio* doctrine should be grouped together. It further challenges some of the Public Defender Agency's categorizations. Under the State's analysis, only 19 of 41 states continue to dismiss the appeal and abate the criminal proceedings in all cases.

It is not necessary, or even useful, to choose between these two analyses. Under the characterization of either party, it [**21] is clear that the legal landscape is very different than it was when *Hartwell* was decided. Our own count, using slightly different categories than either the State or the Public Defender Agency, confirms this. It appears that the highest courts in 41 states have addressed abatement in some manner. The courts in 19 states have continued to apply strictly the doctrine of abatement *ab initio*. [45] Eight states generally dismiss a

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[41] *See* State v. Korsen, 141 Idaho 445, 111 P.3d 130, 133 (Idaho 2005) ("[W]hen reviewing the most recent cases, it is apparent that the trend has been away from abating a deceased defendant[']s conviction *ab initio.*"); Surland v. State, 392 Md. 17, 895 A.2d 1034, 1039 (Md. 2006) [**18] ("[A]n increasingly smaller majority . . . of the courts that have considered the matter adopt this full abatement approach.").

[42] *See* Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction-Modern Cases*, 80 A.L.R.4th 189 (1990 & Supp. 2010) ("[T]he most frequently stated rule is that . . . the prosecution abates from the inception of the case (ab initio)."); *see also* Korsen, 111 P.3d at 134 (referring to abatement *ab initio* as the "majority rule"); Surland, 895 A.2d at 1039 (noting that "a slight majority" of states apply abatement [**19] *ab initio*). The Public Defender Agency also notes, correctly, that federal courts that have addressed the issue have been essentially unanimous in their application of the doctrine of abatement *ab initio* to abate the conviction of criminal defendants. *See* John H. Derrick, Annotation, *Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. Fed. 446 (1986 & Supp. 2009).

[43] *See* Gollott v. State, 646 So. 2d 1297, 1304-05 (Miss. 1994) (overruling prior precedent and adopting a modified approach where an appeal may go forward in certain circumstances but a conviction will otherwise be abated); State v. Holland, 1998 MT 67, 288 Mont. 164, 955 P.2d 1360, 1361-62 (Mont. 1998) (overruling prior precedent and joining "the majority of jurisdictions in holding that prosecution of a criminal case abates in its entirety, including fines, upon the death of the criminal defendant").

[44] To support their analyses, each party has included an appendix where it summarizes each state's caselaw on abatement.

[45] State v. Griffin, 121 Ariz. 538, 592 P.2d 372, 373 (Ariz. 1979) (in banc) ("[D]eath [**22] pending appeal abates the appeal and the conviction."); People v. Gonzalez, 43 Cal. 4th 1118, 77 Cal. Rptr. 3d 569, 184 P.3d 702, 704 n.3 (Cal. 2008) ("[D]efendant's death will abate his appeal . . . ."); Crowley v. People, 122 Colo. 466, 223 P.2d 387, 388 (Colo. 1950) (en banc) ("As to the deceased, the proceedings are abated by operation of law."); People v. Mazzone, 74 Ill. 2d 44, 383 N.E.2d 947, 950, 23 Ill. Dec. 76 (Ill. 1978); Maghee v. State, 773 N.W.2d 228, 231 n.2 (Iowa 2009) ("It is well established that criminal prosecutions, including any pending appellate

deceased defendant's appeal but leave the conviction intact. [46] Two states have unique approaches; Alabama places a particular notation in the [*761] deceased defendant's record, [47] while Oregon gives judges discretion both to dismiss the appeal and to vacate the judgment. [48] Eight states allow some mechanism for the appeal to continue with substitution; if no substitution occurs some of those states abate the conviction while

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proceedings, abate upon the death of the defendant."); State v. Morris, 328 So. 2d 65, 67 (La. 1976) ("[W]e adopt the majority rule and hold that because of defendant's death while the appeal was pending, the judgment of conviction must be vacated and all proceedings in the prosecution abated from its inception."); State v. Carter, 299 A.2d 891, 894 (Me. 1973) ("[T]he death of the defendant in such situation will be held to abate the appeal and require dismissal of it on grounds both of mootness and the inability of the appellate tribunal to proceed because of loss of an indispensable party to the proceeding . . . ."); Commonwealth v. Latour, 397 Mass. 1007, 493 N.E.2d 500, 501 (Mass. 1986) ("When a criminal defendant [**23] dies pending his appeal, the general practice is to dismiss the indictment."); State v. Holland, 1998 MT 67, 288 Mont. 164, 955 P.2d 1360, 1362 (Mont. 1998) ("It further appears to us that the best reasoning is represented by the majority of jurisdictions which hold that a criminal proceeding is abated in its entirety upon the death of the criminal defendant."); State v. Campbell, 187 Neb. 719, 193 N.W.2d 571, 572 (Neb. 1972); State v. Poulos, 97 N.H. 352, 88 A.2d 860, 861 (N.H. 1952) ("Since the defendant Derrickson has died pending his appeal, the appeal on his behalf is abated."); ***People v. Mintz, 20 N.Y.2d 753, 229 N.E.2d 712, 713, 283 N.Y.S.2d 120 (N.Y. 1967)***; State v. Dixon, 265 N.C. 561, 144 S.E.2d 622, 622 (N.C. 1965); ***Nott v. State, 91 Okla. Crim. 316, 218 P.2d 389, 389 (Okla. Crim. App. 1950)*** ("In a criminal prosecution, the purpose of proceedings being to punish the accused, the action must necessarily abate upon his death, and where it is made to appear that the defendant has died pending the determination of the appeal, the cause will be abated."); State v. Merzilli, 111 R.I. 392, 303 A.2d 367, 368 (R.I. 1973); State v. Hoxsie, 1997 SD 119, 570 N.W.2d 379, 382 (S.D. 1997) (holding that defendant who pleaded guilty and then appealed sentence was only entitled to have sentence abated but stating that it did not intend [**24] to disturb the general rule of abatement *ab initio*); Carver v. State, 217 Tenn. 482, 398 S.W.2d 719, 721 (Tenn. 1966) ("[W]e hold that all proceedings in this case against Carver are abated *ab initio*."); Vargas v. State, 659 S.W.2d 422, 423 (Tex. Crim. App. 1983) (en banc) ("Accordingly, the State's motion to dismiss the appeals is overruled. The appeals, however, as well as any further proceedings in the court below, are ordered permanently abated."); State v. Free, 37 Wyo. 188, 260 P. 173, 174 (Wyo. 1927).

[46] State v. Trantolo, 209 Conn. 169, 549 A.2d 1074, 1074 (Conn. 1988) ("[I]t has become clear that, in this case, there is neither allegation nor evidence that the fine levied against the defendant at trial would be collectible from his estate or that the judgment will otherwise affect its interests. On this state of the record, the defendant's appeal must be dismissed as moot."); State v. Raffone, 161 Conn. 117, 285 A.2d 323, 326 (Conn. 1971) ("[D]ue to the death of Arcangelo, the appeal, as to him, is dismissed as moot."); Perry v. State, 575 A.2d 1154, 1156 (Del. 1990) ("[A]s a result of Perry's death, and in the absence of any other real party in interest, this Court has been divested of its jurisdiction to proceed with Perry's direct [**25] appeal. Consequently, the ultimate disposition in Perry's prosecution will be determined by the *status quo* at the time of his death."); State v. Clements, 668 So. 2d 980, 981 (Fla. 1996) ("[W]e hold that upon the death of a criminal defendant, the appeal of a conviction may be dismissed but is not to be abated ab initio."); State v. Korsen, 141 Idaho 445, 111 P.3d 130, 135 (Idaho 2005) ("[W]e hold that a criminal conviction and any attendant order requiring payment of court costs and fees, restitution or other sums to the victim, or other similar charges, are not abated, but remain intact, in the event of the defendant's death following conviction and pending appeal."); Whitehouse v. State, 266 Ind. 527, 364 N.E.2d 1015, 1016 (Ind. 1977); People v. Peters, 449 Mich. 515, 537 N.W.2d 160, 163 (Mich. 1995) ("Where a defendant dies pending an appeal of a criminal conviction, we hold that the appeal should be dismissed, but the conviction retained."), *cert. denied, Peters v. Michigan, 516 U.S. 1048, 116 S. Ct. 710, 133 L. Ed. 2d 665 (1996)*; *State v. Anderson, 281 S.C. 198, 314 S.E.2d 597, 597 (S.C. 1984)*; State v. Christensen, 866 P.2d 533, 535 (Utah 1993). Three states dismiss the pending appeal upon defendant's death, but it is unclear whether the underlying conviction is abated. [**26] See Harris v. State, 229 Ga. 691, 194 S.E.2d 76, 77 (Ga. 1972); ***Royce v. Commonwealth, 577 S.W.2d 615, 616 (Ky. 1979)*** ("The fact of the conviction, whether it be regarded as legally final or not, is history, and as such it cannot be expunged. What meaning and effect it may have at some other time and place is not for the court to determine here and now."); In re Carlton, 285 Minn. 510, 171 N.W.2d 727, 728 (Minn. 1969).

[47] Wheat v. State, 907 So. 2d 461, 464 (Ala. 2005) ("We therefore hold that when a person convicted of a crime dies while an appeal is pending in the Court of Criminal Appeals and that court abates the appeal, pursuant to Rule 43(a), Ala. R. App. P., by reason of the death of that person, the Court of Criminal Appeals shall instruct the trial court to place in the record a notation stating that the fact of the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed.").

[48] Or. R. App. P. 8.05.

others allow it to stand. [49] Two states simply proceed with the appeal. [50] This new diversity of opinions among the high courts of states throughout the country is another reason to conclude that the "changed conditions" element of the test for overruling precedent is satisfied. [51]

2. Would more good than harm result from overruling *Hartwell*

Because the State has successfully demonstrated changed conditions, we must consider whether "more good than harm would result from a departure from precedent" in this instance. [52] *HN8*[↑] In analyzing this element, we must balance the benefits of adopting a new rule against the benefits of stare decisis: providing guidance for the conduct of individuals, creating efficiency in litigation by avoiding the relitigation of decided issues, and maintaining public faith in the [*762] judiciary. [53] These countervailing interests do not weigh heavily in this case. It is unclear how an individual would [**29] rely on the rule adopted in *Hartwell*. That is, it is unlikely that a person would commit a crime because he believed that, upon his death while his appeal was pending, his conviction would be abated. As for the efficiency rationale, while it is true that overturning *Hartwell* would result in some additional litigation of the continued appeals of deceased defendants, the number of such cases should be small. As for the third factor, public faith in the judiciary, allowing continued appeals will protect both victims and defendants by providing the opportunity to have criminal charges fully litigated and decided.

C. Substitution Is The Appropriate Rule To Replace Abatement *Ab Initio*.

The plurality of state courts that have considered the issue strictly apply the doctrine of abatement *ab initio*. [54] The Public Defender Agency urges us to continue to apply this majority rule. In these states, when a criminal defendant dies while the defendant's appeal is pending, [**30] the entire criminal prosecution including the conviction is abated. Courts adopting abatement *ab initio* argue that the death of a criminal defendant pending appeal frustrates his appeal rights and requires the abatement of his conviction. [55]

On the other extreme are those states that generally

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[49] *State v. Makalla, 79 Haw. 40, 897 P.2d 967, 972 (Haw. 1995)*; *Surland v. State, 392 Md. 17, 895 A.2d 1034, 1044-45 (Md. 2006)*; [**27] *Gollott v. State, 646 So. 2d 1297, 1304-05 (Miss. 1994)* ("Thus, the state, in order to avoid abatement *ab initio* of the proceedings, may file a Rule 43(a) motion, in which case we will substitute the decedent's representative, or where appropriate, counsel of record, as party appellant and determine the merits of the appeal."); *City of Newark v. Pulverman, 12 N.J. 106, 95 A.2d 889, 894 (N.J. 1953)* ("We hold the belief that there is likewise no mootness insofar as the family of a deceased defendant is concerned and that his legal representative should have the opportunity to establish on appeal that the conviction was wrongful."); *State v. Salazar, 1997 NMSC 44, 123 N.M. 778, 945 P.2d 996, 1004 (N.M. 1997)* ("This right is best vindicated by permitting the courts either (1) to continue the appeal where a party moves for substitution or where the court deems that the interests involved warrant completion of the review, or (2) to completely abate the proceedings to their inception."); *State v. McGettrick, 31 Ohio St. 3d 138, 31 Ohio B. 296, 509 N.E.2d 378, 381-82 (Ohio 1987)*; *State v. Webb, 167 Wn.2d 470, 219 P.3d 695, 699 (Wash. 2009)* (en banc) ("We hold that when a [defendant] dies during the pendency of his or her appeal, that appeal may be pursued by a party substituted under [**28] the provisions of *RAP 3.2*."); *State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 414 (Wis. 1988)* ("[W]e conclude that, when a defendant dies pending appeal, regardless of the cause of death, the defendant's right to an appeal continues.").

[50] *State v. Jones, 220 Kan. 136, 551 P.2d 801, 804 (Kan. 1976)*; *Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741, 744 (Pa. 1972)*.

[51] *See Kinegak v. State, Dep't of Corr., 129 P.3d 887, 890 (Alaska 2006)* (finding the "changed conditions" element to be satisfied "based primarily on changes in the federal cases in the years since [the prior case] was decided").

[52] *Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 943 (Alaska 2004)*.

[53] *See Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1175-76 n.4 (Alaska 1993)* (citing *Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970)*).

[54] *See supra* note 45.

[55] *See, e.g., United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)* ("[W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to [an appellate] decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal . . . ."); *People v. Rickstrew, 961 P.2d 1139, 1140 (Colo. App. 1998)* ("[W]hen an appeal has been taken from a conviction and death deprived the accused of his or her right to appellate review, the defendant should not stand convicted.").

dismiss a deceased defendant's appeal but leave the conviction intact. We count eight states that follow this approach. [56] Regardless of which rule it has ultimately adopted, almost every court that has discussed the abatement issue has noted that a defendant is no longer presumed innocent [**31] after a conviction; rather a convicted defendant is presumed guilty despite the pendency of an appeal, [57] and the conviction is presumed to have been validly obtained. [58]

Neither extreme seems to us to strike the correct balance. While abatement is contrary to the victims' rights under the Alaska Constitution, relying on the presumption of guilt after conviction to leave the conviction intact is contrary to the defendant's right to appeal. Therefore, we choose the middle path, electing to follow those courts that allow the appeal to continue upon substitution. [59] These courts have provided that either the State or the defendant's estate may request substitution, allowing another party [*763] to be substituted for the defendant. Specifically, we agree with the high courts of Washington and Maryland that HN9[↑] the defendant's estate may substitute in for the deceased appellant. We so decide because allowing [**33] the defendant's appeal to continue when the defendant's estate does not wish it would undermine the right to appeal that substitution is meant to protect. [60]

1. Jurisdiction

Courts that automatically dismiss a deceased defendant's appeal have assumed that an appellate court may not proceed with the appeal because it has lost jurisdiction. [**35] [61] However, as we recognize in

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[56] *See supra* note 46.

[57] *See, e.g., Wheat v. State, 907 So. 2d 461, 462 (Ala. 2005)* ("A conviction in the circuit court removes the presumption of innocence, and the pendency of an appeal does not restore that presumption."); *State v. Clements, 668 So. 2d 980, 981 (Fla. 1996)* ("This Court has stated that the presumption of innocence ceases upon the adjudication of guilt and the entry of sentence." (internal quotation marks omitted)); *Whitehouse v. State, 266 Ind. 527, 364 N.E.2d 1015, 1016 (Ind. 1977)* ("The presumption of innocence falls with a guilty verdict."); *People v. Peters, 449 Mich. 515, 537 N.W.2d 160, 163 (Mich. 1995)* ("The conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right."); *State v. McGettrick, 31 Ohio St. 3d 136, 31 Ohio B. 296, 509 N.E.2d 378, 380 (Ohio 1987)* (stating that a convicted defendant "no longer stands cloaked with the presumption of innocence during the appellate process"); *State v. Devin, 158 Wn.2d 157, 142 P.3d 599, 605 (Wash. 2006)* (en banc) ("[T]here [**32] is no presumption of innocence pending appeal.").

[58] *Clements, 668 So. 2d at 981* ("Furthermore, we have held that a judgment of conviction comes for review with a presumption in favor of its regularity or correctness."); *Whitehouse, 364 N.E.2d at 1016* ("[When a guilty verdict is issued,] although preserving all of the rights of the defendant to an appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown.").

[59] *See supra* note 49.

[60] The courts that have allowed substitution have done so pursuant to their appellate rules. *See, e.g., State v. Makaila, 79 Haw. 40, 897 P.2d 967, 972 (Haw. 1995)* ("By its plain language, *HRAP Rule 43(a)* allows for the substitution of a party for a deceased criminal defendant." (internal citation omitted)); *Gollott v. State, 646 So. 2d 1297, 1304 (Miss. 1994)* ("On its face, Rule 43(a) allows for a substituted party in place of a criminal defendant."); *State v. Salazar, 1997 NMSC 44, 123 N.M. 778, 945 P.2d 996, 1003 (N.M. 1997)* ("The language of the [appellate] rule clearly permits the personal representative or 'any other party' to seek substitution of the deceased."); *McGettrick, 509 N.E.2d at 381* ("The [appellate substitution] rule clearly permits the decedent's personal representative to be substituted as a party . . . ."); *State v. Webb, 167 Wn.2d 470, 219 P.3d 695, 699 (Wash. 2009)* (en banc) ("We hold that when a decedent dies during the pendency of his or her appeal, *RAP 3.2* permits a party to be substituted on appeal."). Alaska Appellate Rule 516 provides [**34] for substitution upon the death of a party to an appeal, but applies only to civil appeals. Because Alaska has no appellate rule providing for substitution in criminal cases, we refer this matter to the Supreme Court's Standing Advisory Committee on Appellate Rules. Until the rules committee promulgates a new rule, a defendant's personal representative may substitute upon the defendant's death. In the absence of an appearance and substitution, the conviction will stand. We do not now address whether any other party besides the defendant's personal representative has the right to substitute. In referring this matter to the rules committee, we note the thoughtful discussion of the issue by the Washington Supreme Court in *State v. Devin, 158 Wn.2d 157, 142 P.3d 599, 606 (Wash. 2006)*:

> [W]e do not preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant's heirs.

[61] *See Hartwell v. State, 423 P.2d 282, 284 (Alaska 1967)* ("Death has removed the appellant from the jurisdiction of this court."); *Perry v. State, 575 A.2d 1154, 1156 (Del. 1990)* ("Therefore, as a result of Perry's death, and in the absence of

HN10[↑] Appellate Rule 516, the death of an appellant should not cause the court to lose jurisdiction over the defendant or the appeal. [62] HN11[↑] A court obtains personal jurisdiction over a criminal defendant by the service of a summons and complaint or by arrest. [63] Once personal jurisdiction is obtained over a party, it will generally not be lost as a result of subsequent events. [64] The trial court properly obtained personal jurisdiction over both Carlin and Dale, and [*764] they are, in a technical sense, still subject to the jurisdiction of the Alaska courts, including the appellate court.

Nor does HN12[↑] an appellate court lose subject matter jurisdiction over an appeal when a party dies. [65] Under AS 22.07.020 the court of appeals has appellate jurisdiction over criminal prosecutions commenced in superior court. The supreme court has final appellate jurisdiction in all actions and proceedings, including jurisdiction to "in its discretion review a final decision of the court of appeals." [66] No statute or court rule divests these appellate courts of jurisdiction upon the death of a party. To the contrary, in [**38] the case of civil appeals, the Alaska Appellate Rules specifically provide that the "death of a party . . . shall not affect any appeal taken or petition for review made." [67] Thus, neither Carlin's nor Dale's appeal is subject to dismissal based on lack of personal or subject matter jurisdiction.

2. Mootness

HN13[↑] We will generally "refrain from deciding questions where the facts have rendered the legal issues moot." [68] A case becomes moot when it "has lost its character as a present, live controversy" or when the "party bringing the action would not be entitled to any relief even if" the party prevails. [69]

But a criminal appeal, even after the defendant has died, may remain a "present, live controversy." Often, there will be a financial component, such as restitution, [**39] to a criminal judgment, and the appeal will thus have financial consequences for the defendant's estate. This situation is analogous to disputes over attorney's fees in civil cases that are otherwise moot. In *LaMoureaux v. Totem Ocean Trailer Express, Inc.* we held that such cases may continue. [70]

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any other real party in interest, this Court has been divested of its jurisdiction to proceed with Perry's direct appeal. . . . Perry's appeal is moot and is [dismissed]."); *State v. Kriechbaum, 219 Iowa 457, 258 N.W. 110, 113 (Iowa 1934)* ("Death withdrew the defendant from the jurisdiction of the court. It left no apportionment of jurisdiction."); *State v. Holland, 1998 MT 67, 288 Mont. 164, 955 P.2d 1360, 1362 (Mont. 1998)* [**36] ("In a criminal case, however, no case or controversy remains upon the death of the defendant."); *State v. Campbell, 187 Neb. 719, 193 N.W.2d 571, 572 (Neb. 1972)* ("The death of the defendant makes the case moot and requires dismissal of the appeal").

[62] *Cf. Collison v. Thomas, 55 Cal. 2d 490, 11 Cal. Rptr. 555, 360 P.2d 51, 54 (Cal. 1961)* (in bank) ("The court did not lose jurisdiction of the case in the strict sense upon Mrs. Kellogg's death. This is established by the many cases in this state holding that the death of a party pending suit does not oust the jurisdiction of the court, and hence that the judgment is voidable only, not void. This does not mean that a judgment can be really rendered for or against a dead man, but that it can be rendered nominally for or against him, as representing his heirs, or other successors, who are the real parties intended." (internal quotation marks omitted)).

[63] *See State v. Gottschalk, 138 P.3d 1170, 1173 (Alaska App. 2006)* (Mannheimer, J., concurring) (citing *Alaska R. Crim. P. 4*).

[64] *See Kotsonis v. Superior Motor Express, 539 F. Supp. 642, 646 (M.D.N.C. 1982)* (stating that, in the context of transfer of venue, "[p]ersonal jurisdiction once obtained is not lost."); *Gilford v. People, 2 P.3d 120, 130 (Colo. 2000)* [**37] (en banc) (Hobbs, J., concurring) (explaining that "[a] court does not generally lose jurisdiction by the occurrence of a subsequent event, even if that event would have prevented acquiring jurisdiction in the first instance"); *Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521, 525 (Conn. 1948)* (regarding as settled law that "if a court of a state has jurisdiction when an action is brought to it, a subsequent removal of a party from the state will not terminate that jurisdiction"); *People v. Goecke, 457 Mich. 442, 579 N.W.2d 868, 876 (Mich. 1998)* ("Having once vested in the circuit court, personal jurisdiction [over a criminal defendant] is not lost even when a void or improper information is filed.").

[65] *See United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001)* (determining that appellate jurisdiction is not at issue where "defendant dies after appealing the entry of a judgment of sentence" because a final order has been entered).

[66] *AS 22.05.010(a), (d).*

[67] *Alaska R. App. P. 516(a).*

[68] *O'Callaghan v. State, 920 P.2d 1387, 1388 (Alaska 1996)* (internal quotation marks omitted).

[69] *Gerstein v. Axtell, 960 P.2d 599, 601 (Alaska 1998).*

[70] *651 P.2d 839, 840 n.1 (Alaska 1982).*

Even without monetary consequences, the appeal is not necessarily moot. As discussed above, HN14[↑] the particular sentence a defendant is to receive is but one component of the administration of criminal justice. Article I, section 12 of the Alaska Constitution provides that "[c]riminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation." [71] The interests of the victim and the community's interest in condemning the offender persist even after the defendant's death.

The defendant's interests also support treating the appeal as not moot. The appeal has important consequences for the defendant's reputation and estate, as explained by the former Chief Justice of the Supreme [**40] Court of Wisconsin:

> It is not [defendant's] appeal which is moot, as the dissent would have it, but rather it is his death which is moot, because he did not take the potential errors of our justice system into the grave with him. These potential errors remain behind to perplex and confound his relatives, friends, reputation, and the legal system. Indeed, an important point of the majority opinion is that these errors remain behind to worry society at large, because such important collateral matters as inheritance, insurance benefit distribution, and distribution of various property may wind up being conclusively determined without benefit of a review for error in the potentially [*765] controlling criminal action. [72]

3. Representation

Though the death of a criminal defendant does not require dismissal of the appeal for mootness or lack of jurisdiction, it creates obvious practical complications for continuing an appeal. Of immediate concern will likely be whether, after the defendant dies, his attorney can continue to prosecute the appeal. If the defendant's attorney can no longer act as defendant's representative, [**41] then the appeal may be subject to dismissal for failure to prosecute. [73] The Court of Appeals of Maryland thoughtfully discussed this issue. It first noted that "the defendant's death, as a matter of agency law, would ordinarily terminate the lawyer-client relationship and, with that termination, the authority of the erstwhile agent . . . to continue an appeal already noted." [74] But taken to its logical extreme, continued the court, that conclusion would prevent defendant's counsel from moving for dismissal of the prosecution and even seeking to abate the conviction. [75] In *Carlin v. State*, the Public Defender Agency filed such a motion before the court of appeals. Because courts allow these motions, an attorney must have some authority to act on behalf of a deceased client. The Maryland court further observed that, "[a]s a practical matter, the role that the client plays in criminal appeals is very limited." [76]

In the case of a privately retained attorney, the personal representative of the defendant's estate can elect to continue the attorney's services. We conclude that the public defender is also authorized to continue representing a deceased defendant after the personal representative of the defendant's estate chooses to continue the appeal. HN15[↑] The Public Defender Act provides that "[a]n indigent [**43] *person* who is under formal charge of having committed a serious crime and the crime has been the subject of an initial appearance or subsequent proceeding, or is being detained under a conviction of a serious crime" is entitled to "be represented." [77] At oral argument, there was debate about whether the word "person" could include a deceased defendant. Some courts, when construing other statutes using the word "person," have held that

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[71] Alaska Const. art. I, § 12.

[72] State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 415 (Wis. 1988) (Heffernan, C.J., concurring).

[73] ***Alaska R. App. P. 511.5***; *see also* Alaska R. Civ. P. 25(a) (civil case dismissed if no timely motion for substitution is made following the death of a party); Surland v. State, 392 Md. 17, 895 A.2d 1034, 1045 (Md. 2006) ("If no substituted party comes forth within the time allotted by Rule 1-203(d) [**42] and elects to continue the appeal, it will be dismissed, not for mootness but for want of prosecution, and, as with any appeal that is dismissed, the judgment will remain intact.").

[74] Surland, 895 A.2d at 1041, 1045.

[75] Id. at 1041. The Supreme Court of Idaho, after noting that "[a]n attorney in a criminal case may not withdraw from representation of a defendant without leave of court," held that an attorney has the authority to file a motion to abate the conviction of a client that has died during an appeal. State v. Korsen, 141 Idaho 445, 111 P.3d 130, 132-33 (Idaho 2005).

[76] Surland, 895 A.2d at 1041 n.3; *see also* Coffman v. State, 172 P.3d 804, 807 (Alaska App. 2007) ("[E]ven though it is the [criminal] defendant's decision *whether* to appeal, it is the attorney's role to decide *which issues* to raise on appeal.").

[77] AS 18.85.100(a) (emphasis added).

"person" can include the deceased [78] while other courts have held that it cannot. [79] In the context of appeals on behalf of deceased defendants, Maryland has allowed continued representation by the public defender. [80] Because the purpose of the [*766] Public Defender Act is to provide representation comparable to representation by private attorneys, [81] we interpret the Public Defender Act to allow continued representation on appeal after the death of the defendant where the defendant's estate chooses to proceed with the appeal.

V. CONCLUSION

In *State v. Carlin*, we REVERSE the order of the court of appeals granting the motion by Carlin's counsel to dismiss Carlin's appeal and abate his criminal proceedings. We REMAND to the court of appeals to continue the case for 60 days, during which time Carlin's estate may move for substitution and to proceed with the appeal; if no motion is filed, the court of appeals is directed to dismiss the appeal and to leave Carlin's conviction intact. In *Dale v. State*, we DENY the State's motion to dismiss the appeal and Dale's attorney's cross-motion for abatement *ab initio* or to continue the appeal. Dale's estate has 60 days in which to move for substitution and to proceed with the appeal; if no motion is filed, we will dismiss the petition and leave Dale's conviction intact.

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[78] *See, e.g., **United States v. Maciel-Alcala, 612 F.3d 1092 (9th Cir. 2010), cert. denied, Maciel-Alcala v. United States, 131 S. Ct. 673, 178 L. Ed. 2d 501, 2010 WL 4168514 (2010)**; United States v. LaFaive, 618 F.3d 613, 618 (7th Cir. 2010)* [**44] ("We are also unpersuaded that because some states have drafted identity theft statutes that explicitly mention deceased individuals, we should not read deceased persons into the definition of "person" in *§ 1028A*. That Congress could have drafted the statute differently does not negate the plain meaning of the statute as enacted."); *State v. Hardesty, 42 Kan. App. 2d 431, 213 P.3d 745, 749 (Kan. App. 2009)* (holding that an identity theft statute's use of term "person" included both living and deceased victims of identity theft).

[79] *See, e.g., Guyton v. Phillips, 606 F.2d 248, 250-51 (9th Cir. 1979)*.

[80] *Surland v. State, 392 Md. 17, 895 A.2d 1034, 1045 (Md. 2006)* ("Because counsel, whether private counsel or the Public Defender, is usually already in the case and, but for the appellant's death, would be obliged to see it through, we see no reason why, unless a substituted party obtains other counsel, counsel already of record should not continue to prosecute the appeal, as they were employed or appointed to do.").

[81] *See McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974)* ("Once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into [**45] an attorney-client relationship which is no less inviolable than if counsel had been retained.") (quoting *Smith v. Superior Court, 68 Cal. 2d 547, 68 Cal. Rptr. 1, 440 P.2d 65, 74 (Cal. 1968)*).

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State v. Devin

Supreme Court of Washington

March 14, 2006. ; August 24, 2006, Filed

No. 76947-8

Reporter
158 Wn.2d 157 *; 142 P.3d 599 **; 2006 Wash. LEXIS 616 ***

THE STATE OF WASHINGTON, *Petitioner*, v. JULES DEVIN, *Respondent*.

Prior History: [***1]

State v. Devin, 156 Wn.2d 1009, 132 P.3d 147, 2006 Wash. LEXIS 110 (2006)

Counsel: *Norm Maleng, Prosecuting Attorney*, and *Brian M. McDonald, Deputy*, for petitioner.

Gregory C. Link (of *Washington Appellate Project*), for respondent.

Robert M. McKenna, Attorney General, William B. Collins and *Carol A. Murphy Senior Counsel*, on behalf of the Office of the Attorney General, amicus curiae.

Judges: ALEXANDER, C.J. AUTHOR: Chief Justice Gerry L. Alexander. WE CONCUR: Justice Tom Chambers, Justice Charles W. Johnson, Justice Susan Owens, Justice Barbara A. Madsen, Justice Mary E. Fairhurst, Justice James M. Johnson, Justice Bobbe J. Bridge.

Opinion by: ALEXANDER

Opinion

[*158] [**599] P1 ALEXANDER, C.J. — The Court of Appeals vacated the attempted murder conviction of Jules Devin because after [*159] his conviction, Devin died. We hold that because Devin failed to file a timely appeal, it was error to apply the common law rule that when a criminal appellant dies with an appeal pending, the underlying conviction is abated as if it never happened. Furthermore, we agree with the State that the abatement rule, first established in 1914 in *State v. Furth, 82 Wash. 665, 667, 144 P. 907 (1914)*, is in conflict with modern laws that compensate crime victims for their suffering. Accordingly, we overrule *Furth* to the extent that it vacates challenged convictions automatically upon an appellant's death, regardless of whether the unresolved appeal has merit or whether [***2] compensation is still owed to victims.

I. FACTS

[**600] P2 On January 4, 2002, Jacqueline Galan [1] was shot in the face and neck while standing in the driveway of her Burien home as her three-year-old daughter sat in the car nearby. At the time of the shooting, Galan was engaged in a child custody dispute with Phillip Devin, the son of Jules Devin. In May 2003, a jury convicted Jules Devin of the first degree attempted murder of Galan, his daughter-in-law. On September 12, 2003, Devin received a standard range sentence of 300 months in prison and was ordered to pay a $ 500 victim penalty assessment to King County. Restitution to the victim was neither required nor ruled out at that time. At sentencing, Devin signed a "notice of rights on appeal" in which he acknowledged his right to appeal the conviction as well as a sentence outside the standard range. Clerk's Papers (CP) at 14. He was advised that his sentence was inside the standard range and that "unless a written notice of appeal is filed within 30 days after the entry of this judgment (today), the right of appeal is irrevocably waived." *Id.*

[***3] P3 Shortly after Devin was sentenced, Galan obtained sole custody of her daughter. In awarding [*160] custody, the court said that Phillip Devin had cultivated a climate of fear and intimidation within his family and that his violence and threats "ultimately culminated in" his father, Jules Devin, shooting Galan in front of the child. State's Mot. to Recons. Order Vacating Conviction, App. B at 6.

P4 On December 30, 2003, the King County

[1] At the time of the shooting, Ms. Galan went by her married name of Jacqueline Devin.

prosecutor's office notified the court that it was unable to set a restitution amount for Galan. The prosecutor indicated that she "did not want to claim" restitution, that attempts to reach Galan had failed, and also that her health insurer had provided no documentation of its coverage of her medical costs. CP at 17.

P5 Although Devin had been notified at sentencing that any appeal must be filed within 30 days, he waited nearly six months to file a notice of appeal. In his March 5, 2004, notice of appeal, Devin sought review only of his sentence, not his conviction. [2]

[***4] P6 About a month later, Devin's newly appointed appellate counsel was notified that Devin's notice of appeal was not timely. On May 3, 2004, Devin moved to enlarge the time for filing a notice of appeal in an attempt to cure the timeliness problem.

P7 In his motion to enlarge, Devin inaccurately stated that in his March 2004 notice of appeal, he sought review of his conviction, not just his sentence. Devin contended in his motion that (1) his trial counsel reportedly recalled that Devin's family agreed not to pursue an appeal, but (2) trial counsel "has not said" whether Devin himself instructed him to forgo an appeal, and (3) Devin "never elected not to appeal his case and apparently assumed a notice of appeal was filed." Mot. to Enlarge to File Notice of Appeal at 2. Based on these alleged facts, which lacked documentation, Devin contended that the record did not show that he [*161] voluntarily waived his right to appeal. The State opposed Devin's motion, pointing out that he provided no affidavits or sworn declarations from his trial counsel, himself, or others, supporting his claim that he intended all along to appeal his conviction. The State asked for a reference hearing to explore what [***5] communications took place between trial counsel and Devin and to determine if Devin voluntarily waived his right to appeal. [3]

P8 On June 6, 2004, the Court of Appeals remanded the motion to enlarge to the King County Superior Court with instructions to hold a reference hearing within 60 days. Although it is not clear from the record exactly when Devin died, on November 15, 2004, Devin's counsel moved to "reverse" Devin's conviction "because Mr. Devin has died." Appellant's Mot. to Reverse & Dismiss Conviction at 1. This motion again inaccurately [**601] stated that Devin's March 2004 notice of appeal was for both his conviction and sentence. The court was told that Devin's death occurred "[p]rior to the ordered reference hearing" and that although the notice [***6] of appeal was untimely, "the State has not established that the tardy filing of the notice was the result of a knowing, intelligent and voluntary waiver of the right" to appeal. *Id.* at 3, 4. The motion stated that because Devin died while pursuing an appeal, his conviction must be dismissed pursuant to *Furth, 82 Wash. 665*.

P9 On February 11, 2005, the Court of Appeals issued the following brief order: "The attorney representing Jules Devin has moved to reverse his conviction and remand this case to the superior court for dismissal because Devin has died. We have considered the motion and determined that the conviction should be vacated and the appeal dismissed." Order Vacating Conviction and Dismissing Appeal. A month later, the court issued an equally brief order saying--without explanation--that the State's motion for reconsideration was denied.

[*162] P10 The King County prosecutor, on behalf of the State of Washington, petitioned this court for review of two issues: (1) whether the *Furth* abatement doctrine should be abandoned in light of modern victim rights policies and (2) whether the doctrine should apply where the deceased defendant's notice of appeal was not timely. [***7] The petition included Galan's sworn declaration that the abatement of Devin's conviction has distressed her emotionally. She expressed fear that the abatement could lead to a reopening of the child custody case, which would aggravate her anxiety about the possibility of more violence. Amicus curiae, the attorney general of Washington, supported the State's position on behalf of crime victims.

II. ANALYSIS

P11 *HN1*[↑] The abatement rule first surfaced in Washington more than 90 years ago in *Furth*. This court said in that case, "The courts of the country, both state and Federal, have, with marked unanimity, held that the death of the defendant in a criminal case pending appeal, in the absence of a statute expressing the contrary, permanently abates the action and all

[2] The notice of appeal said, "The Defendant: Jules D. Devin [s]eeks review by the Court of Appeals of the: sentence entered on: Sept. 12, 2003." CP at 16. It said nothing about the May 2003 conviction.

[3] At that time, the State conceded that the record did not establish a voluntary waiver of Devin's right to appeal. The State later argued that such a concession was in error and that this court is not bound by an erroneous concession related to a matter of law.

proceedings under the judgment." Furth, 82 Wash. at 667. "The underlying principle is that the object of all criminal punishment is to punish the one who committed the crime or offense, and not to punish those upon whom his estate is cast by operation of law or otherwise." *Id.*

P12 *Furth* relied partly on the reasoning of United States v. Pomeroy, 152 F. 279 (C.C.D.N.Y. 1907), [***8] *rev'd on other grounds sub nom.* United States v. N.Y. Cent. & Hudson River R.R., 164 F. 324 (2d Cir. 1908). In one of the earliest expressions of the policy underlying abatement, *Pomeroy* said that "the fundamental principle applicable to this case is that the object of criminal punishment is to punish the *criminal*, and not to punish his family." Id. at 282 (emphasis added).

> In this case the defendant was fined $ 6,000. That money was not awarded as compensation to the United States. No harm [*163] had been done to the United States. It was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, *he* would have been punished by the deprivation of that amount from his estate; but, upon his death, there is no justice in punishing his family for his offense.

Id. (emphasis added). Thus, the concern was with shielding innocent heirs from financial obligations intended to punish their deceased ancestors.

P13 The defendant in *Furth* had been convicted of aiding and abetting the receiving of deposits by an insolvent bank. He was fined $ 10,000 plus costs and was ordered to remain in custody [***9] "until such fine and costs are paid." Furth, 82 Wash. at 667. He died while his appeal was pending, and both the State and the executrix of Furth's estate asked the court to decide the appeal on the merits. In response, this court examined *Pomeroy* and other cases around the country in which the abatement rule was applied and concluded, "We think the action abated as to the appellant Furth upon his [**602] death." Id. at 672. Therein, Washington's abatement rule was born.

A

P14 Besides *Furth*, the only published opinion in Washington applying the abatement rule is State v. Banks, 94 Wash. 237, 237-38, 161 P. 1189 (1917), consisting of a mere three paragraphs. The State contends that in *Banks* and *Furth*, this court did not clearly adopt the doctrine known as "abatement ab initio," which abates the underlying conviction and not just unpaid financial penalties upon the death of an appellant. Suppl. Br. of Pet'r at 13. Thus, the first question in this case is whether *Furth* or *Banks* embraced the "ab initio" doctrine. If not, the abatement in this case should have extended only to Devin's $ 500 victim penalty assessment, if it [***10] remained unpaid, and not to the underlying conviction.

P15 The State points out that in *Furth*, this court did not just declare the action abated due to death but actually [*164] addressed the merits of the appeal and reversed the deceased defendant's conviction based on insufficient evidence. Furth, 82 Wash. at 672, 679. This might suggest that, under the rule announced in *Furth*, convictions are not abated unless there is some meritorious claim of trial court error. But in Banks, 94 Wash. at 238, we clarified that we addressed the merits of the appeal in *Furth* only because the other defendants in that case were still being tried. We also said there was no pending trial in the *Banks* case that justified deciding the merits of the appeal in question there. *Id.* Then, citing *Furth*, we concluded (without discussion) that "[t]he action has abated by the death of appellant, and must, for that reason, be dismissed." *Id.* Thus, *Banks* suggested that unless vacation of the deceased defendant's conviction could affect codefendants still to be tried, it is required regardless of the merits of the pending appeal.

WA[1][↑] [1] WA[2][↑] [2] P16 Furthermore, although [***11] *Furth* does not explicitly require vacating of convictions, it discusses several cases in which the underlying judgments were reversed. *See* United States v. Mitchell, 163 F. 1014, 1016-17 (C.C.D. Or. 1908); Pomeroy, 152 F. at 283; Boyd v. State, 3 Okla. Crim. 684, 108 P. 431 (1910). In citing those cases as support for abating the "action" in *Furth*, this court appeared to embrace the "ab initio" rule. *See also* Tim A. Thomas, Annotation, Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction-Modern Cases, 80 A.L.R.4th 189, § 2, at 191 (2005) ("[i]t appears that the most frequently stated rule is that . . . the prosecution abates from the inception of the case . . . ."). HN2[↑] In light of *Furth's* reliance on cases applying the "ab initio" doctrine, and the prevailing common law rule that abatement extends to the underlying conviction and not just to financial penalties, we conclude that *Furth* announced an abatement rule consistent with the "ab initio" doctrine.

B

P17 The next question is whether the *Furth* rule requires

vacation of a conviction even when the conviction [*165] was not timely appealed. [***12] Here, the State argues that when Devin died, his appeal was not "pending," for the purpose of applying the *Furth* rule, because (1) he was advised that if he failed to appeal his conviction within 30 days of sentencing, his right to appeal would be irrevocably waived; (2) he nevertheless waited six months to file a notice of appeal; and (3) before his death, he offered no declaration or other proof supporting his explanation of the delay. Devin's counsel responds that because Devin filed a notice of appeal and because the State agreed that a reference hearing was needed to determine if the late appeal could proceed, his appeal was in fact "pending" when he died. Suppl. Br. of Resp't at 20.

P18 *Boyd*, one of the cases discussed in *Furth*, is instructive in determining if Devin's appeal was pending for the purposes of applying the abatement rule. In *Boyd*, the *March* court said that the prosecution of a crime abates "when the accused has taken an appeal *in the manner prescribed by law*" and then dies while such an appeal is pending. *Boyd, 3 Okla. Crim. at 685* (emphasis added) (quoting *March v. State, 5 Tex. Ct. App. 450 (1878)).* [***13] By citing *Boyd* as support for adopting the abatement rule in Washington, this court implicitly agreed with that case that abatement should apply only [**603] when the deceased appellant filed an appeal "in the manner prescribed by law." Here, Devin filed his notice of appeal five months later than prescribed by *RAP 5.2(a)*. Therefore, Devin's untimely attempt at an appeal should not have triggered abatement under *Furth*.

P19 Devin's counsel asserts that if a defendant still has the right to appeal at death, he should be treated the same as a defendant whose appeal is pending because in either case the conviction is not "final." Suppl. Br. of Resp't at 11, 20. For that argument, counsel relies upon *United States v. Oberlin, 718 F.2d 894 (9th Cir. 1983)*, in which the court abated the conviction of a man who committed suicide within hours of receiving a guilty verdict, before an appeal could be filed. The court said in that case:

> [*166] [A]t the time of his death, Oberlin possessed an appeal of right from his conviction. We conclude that, although Oberlin did not die pending appeal, the effect of his death is the same--the prosecution abates [***14] *ab initio.* We see no reason to treat a criminal defendant who dies before judgment is entered any differently from one who dies after a notice of appeal has been filed. In either case, he is denied the resolution of the merits of the case on appeal.

Oberlin, 718 F.2d at 896. But here, unlike in *Oberlin* Devin did not miss the chance to file an appeal. He actually filed one, and chose to appeal only his sentence, not his conviction. Therefore, even if we agreed with the reasoning of *Oberlin*, we could not fairly conclude that Devin was "denied the resolution of the merits" of an appeal as to his guilt. If Devin himself declined to challenge his guilty verdict, why should this state's courts erase it for him posthumously?

P20 The other flaw in this argument is that it assumes Devin still had the right to appeal his conviction when he died. Devin's counsel cites *State v. Kells, 134 Wn.2d 309, 949 P.2d 818 (1998)*, for the proposition that the right to appeal a conviction exists until the State proves that the right was waived. We said in *Kells* that *HN3*[↑] "there can be no presumption in favor of waiver of a constitutional right," and that [***15] "a criminal appeal may not be dismissed as untimely unless the State demonstrates that the defendant voluntarily, knowingly, and intelligently abandoned his appeal right." *Id. at 313, 314*. But *Kells* actually undermines the argument that Devin still had a right to appeal when he died. That is because here, unlike in *Kells* the State *has* demonstrated a voluntary, knowing, and intelligent waiver: Devin was warned that he would irrevocably waive his right to appeal if he failed to pursue it within 30 days, and yet he did just that. We are presented with no evidence to the contrary. [4] [***16] Furthermore, in *Kells* the issue [*167] was whether the defendant could voluntarily waive a right that he was not told he had. [5] In this case, by contrast, it is undisputed that Devin was fully informed of the relevant appeal rights. Thus, we

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[4] It is immaterial whether, at the time that Devin sought to cure his timeliness problem, his trial counsel had "not said" to Devin's appellate counsel whether Devin himself agreed with his family's wish to forgo an appeal. Even if this unsworn assertion is true, it merely reflects a lack of precision in communications between Devin's trial and appellate attorneys. In the absence of an affidavit or declaration establishing that Devin actually told his trial attorney to file an appeal and that such instruction was somehow forgotten, misunderstood, or ignored, we are unable to conclude that Devin did not voluntarily, knowingly, and intelligently waive his right to appeal.

[5] Specifically, the defendant asserted he had not waived his right to appeal the juvenile court's declination order because he was not told that he maintained such a right after pleading guilty. *Kells, 134 Wn.2d at 312*.

need not be concerned that Devin might have done something differently with proper notice. In sum, Devin's counsel is incorrect in arguing that Devin still had the right to appeal his conviction when he died.

P21 In conclusion, because Devin did not file a timely appeal of his conviction before his death, his conviction should not have been vacated simply because he died. We hold that the *Furth* rule does not require vacation of a conviction that was not appealed in a manner prescribed by law.

C

P22 Because of our holding that *Furth* was incorrectly applied in this case, we [**604] need not reach the question of whether to modify or abandon the *Furth* rule. However, in light of the extensive briefing on that question, its importance to victims rights, and the likelihood that it will come up again, we take this opportunity to address it.

P23 In debating whether this court should overturn *Furth*, the parties in this case have focused on the doctrine of stare decisis, which requires certain conditions to be met before a rule is abandoned. Before we turn to stare decisis, [***17] however, we note that *Furth* itself envisioned that its abatement rule would yield to contrary statutes. *Furth* said, "The courts . . . have, with marked unanimity, held that the death of the defendant in a criminal case pending appeal, *in the absence of a statute expressing the contrary,* [*168] permanently abates the action and all proceedings under the judgment." *Furth, 82 Wash. at 667* (emphasis added). Many years after *Furth* was decided, the legislature adopted a statute requiring payment of restitution to victims of felonies. *RCW 7.69.030*. At least arguably, that statute trumps the *Furth* abatement rule because it "expresses" a mandate "contrary" to abatement of all penalties and proceedings.

WA[3] [3] P24 We now turn to the State's request to abandon the *Furth* "ab initio" rule. *HN4* "The doctrine of stare decisis 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'" *Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004)* (quoting *In re Rights to Use of Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)*). Thus, the first question is whether the [***18] "ab initio" rule is incorrect.

WA[4] [4] P25 The State and amicus argue that it is incorrect because it is based on the outdated premise that convictions and sentences serve only to punish criminals, and not to compensate their victims. Indeed, since *Furth* was decided, *HN5* the people amended our state constitution to "ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect" by guaranteeing notice and an opportunity to be heard at relevant proceedings. *Const. art. I, § 35*. Also, *RCW 7.69.030* establishes various "rights" of victims, including restitution in all felony cases ("unless extraordinary circumstances" make restitution inappropriate (*RCW 7.69.030(15)*). *RCW 43.280.080* creates an office of crime victims advocacy to advocate for victims' rights. And *RCW 7.68.035* requires convicted defendants to pay "penalty assessments" to counties as part of a victims' compensation program. Thus, *Furth*'s fundamental principle--"that the object of all criminal punishment is to punish the one who committed the crime or offense"--simply does not reflect [***19] the compensation purpose served by restitution and victim penalty assessments. *Furth, 82 Wash. at 667*.

[*169] P26 Devin's counsel cites *State v. Kinneman, 155 Wn.2d 272, 281, 119 P.3d 350 (2005)*, for the proposition that "'restitution is punishment'" rather than compensation. Suppl. Br. of Resp't at 17. This is highly misleading. *Kinneman* actually says, "In Washington restitution is both punitive and compensatory," and "[r]estitution is at least as punitive as compensatory." *Kinneman, 155 Wn.2d at 279-80, 281*. Thus, even recognizing a strong punitive component to restitution, the point remains that it also serves a compensatory purpose and that *Furth* is incorrect in stating that the "only" purpose of all criminal punishment is to punish the offender.

P27 The State and amicus also argue that the "ab initio" doctrine is incorrect for another reason: it rests on a presumption that convicted criminals are innocent and that their pending appeals ultimately would prevail. The United States Supreme Court said in *Herrera v. Collins, 506 U.S. 390, 399, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)*,*HN6* "Once a defendant has been afforded [***20] a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." Similarly, this court has said that an accused person is presumed innocent "until found guilty beyond a reasonable doubt." *State v. Salle, 34 Wn.2d 183, 190, 208 P.2d 872 (1949)*. Consistent with that holding, we have found no constitutional right to bail pending appeal. *State v. Smith, 84 Wn.2d 498, 499-500, 527 P.2d 674 (1974)*. Furthermore, we have allowed prosecutors to impeach a defendant's credibility with a "presumptively [**605] valid prior conviction" although it was subject to a pending appeal. *State v.*

Murray, 86 Wn.2d 165, 166, 543 P.2d 332 (1975). These cases establish that there is no presumption of innocence pending appeal. Accordingly, we conclude that *Furth* is incorrect in light of later decisions cutting off the presumption of innocence after conviction, and in view of modern compensatory statutes.

P28 Devin's counsel defends the correctness of the "ab initio" doctrine by pointing to its prevalence in federal appellate court decisions. Indeed, the rule that a conviction [*170] abates on the death of the accused before his [***21] appeal has been decided is "followed almost unanimously by the Courts of Appeals." *United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001)*. Devin's counsel also argues that 27 states have adopted the doctrine and that the dominant theme among decisions in those states "is that an appeal of right is a fundamental component of the criminal process, and that without such an appeal the conviction is not final." Suppl. Br. of Resp't at 7.

P29 It is true that our state constitution guarantees a right of appeal. *State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978)*. But Devin's counsel points to no opinion holding that the constitution also requires abatement of a conviction when a defendant dies pending an appeal.

P30 Having concluded that the "ab initio" rule is incorrect, we must next determine whether it is also harmful. The State argues that the rule is harmful because it may deprive crime victims of compensation required by law and because of "important collateral consequences," including emotional distress, lessened ability to recover a civil judgment, and potential impacts on family court proceedings. Pet. for Review at 6.

P31 Recently, at least two courts [***22] have invoked emotional harm as a reason to depart from common law abatement rules.

> Abatement *ab initio* allows a defendant to stand as if he never had been indicted or convicted. The State points out in its briefing that, while the defendant will never be able to appreciate the benefits of abatement, such a result "is particularly unfair to crime victims who have participated in often times painful trials only to see a hard won conviction overturned . . . based upon the arbitrary timing of the defendant's death."

State v. Korsen, 141 Idaho 445, 111 P.3d 130, 134 (2005) (citation omitted). "[A]batement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these [victims' rights] laws by preventing the finality and closure they are designed to provide." *Id. at [*171] 135*; *see also Wheat v. State, 907 So. 2d 461, 464 (Ala. 2005)* (recognizing "'the callous impact" that vacating a conviction "'necessarily has on the surviving victims of violent crime'" (quoting *People v. Robinson, 298 Ill. App. 3d 866, 873, 699 N.E.2d 1086, 232 Ill. Dec. 901 (1998)*)).

P32 While Galan apparently declined [***23] to seek restitution and therefore did not suffer financial harm from the abatement in this case, she was shocked and distressed when Devin's record was wiped clean, and she fears renewed violence and strife if the child custody case is reopened. These impacts alone, as described in her declaration, make the abatement rule "harmful" as applied here.

P33 Devin's counsel protests that some of the harms feared by Galan, such as a weakening of her position in the child custody dispute with Devin's son, may never come to pass. But this court is not concerned only with certain, identifiable harms. Besides, any harm to Devin's heirs from restoring the conviction is equally speculative. Nothing in the record establishes that Devin's heirs would suffer financially in the absence of abatement. In fact, the only financial obligation reflected in Devin's judgment and sentence was the $ 500 victim penalty fee, and nobody has suggested that the fee was unpaid at the time of abatement or that it would burden the estate today.

P34 In sum, *HN7*[↑] the basis of the abatement rule is to prevent financial harm to a convicted criminal's heirs. [6] If our State's goal is to ward off potential harm to innocent people, it [***24] [**606] makes no sense to protect the heirs of criminals but not their victims. The *Furth* rule threatens to deprive victims of restitution that is supposed to compensate them for losses caused by criminals. *Article I, section 35 of our state constitution* demands that the victims of crime receive "due dignity and respect." Therefore, we conclude that both the "harmful" and "incorrect" prongs of the test for overcoming stare decisis are met. Accordingly, we overrule *Furth* to the extent that it automatically abates convictions as well as [*172] victim compensation orders upon the death of a defendant during a pending appeal.

P35 In so doing, *HN8*[↑] we do not preclude courts from abating financial penalties still owed to the county

[6] There is no requirement in *Furth* to find actual harm from allowing a conviction to stand.

or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant's heirs. We also do not [***25] preclude courts from deciding a criminal appeal on the merits after the appellant has died, if doing so is warranted. We decline, though, to fashion a new doctrine in place of the *Furth* "ab initio" rule, as suggested by the State and amicus.

III. CONCLUSION

P36 *Furth* no longer makes sense in light of victims' compensation policies enacted since it was decided. It was incorrectly applied in this case because the defendant had no pending appeal of his conviction when he died. Therefore, this court reverses the order of the Court of Appeals vacating the conviction of Jules Devin and overrules *Furth* as explained above.

C. JOHNSON, MADSEN, BRIDGE, CHAMBERS, OWENS, FAIRHURST, and J.M. JOHNSON, JJ., concur.

Concur by: SANDERS

Concur

P37 SANDERS, J. (concurring) -- I concur in the holding that prosecution of Jules Devin does not abate because he failed to timely appeal his conviction. However, the majority's discussion of the merits of the doctrine of abatement ab initio is obiter dicta in its entirety. "The issue to which the statement relates [***26] was not before the court and, therefore, the statement did not and could not announce our adherence to such a rule." *State ex rel. Johnson v. Funkhouser, 52 Wn.2d 370, 374, 325 P.2d 297 (1958)*. The doctrine of abatement ab initio reflects the "'fundamental principle . . . that the object of criminal punishment is to punish the criminal, and not to punish his family.'" *State v. Furth, 82 Wash. 665, 668, 144 P. 907 (1914)* (quoting *United States v. Pomeroy, 152 F. 279, 282 (1907), rev'd [*173] on other grounds sub nom. United States v. N.Y. Cent. & Hudson River R.R., 164 F. 324 (2d Cir. 1908)*). Accordingly, prosecution must cease with the death of the accused. Abatement ab initio is a venerable fixture of Washington law, and it remains the law of the State.

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Surland v. State

Court of Appeals of Maryland

April 11, 2006, Filed

No. 8, September Term, 2005, No. 45, September Term, 2005

Reporter
392 Md. 17 *; 895 A.2d 1034 **; 2006 Md. LEXIS 173 ***

CARL SURLAND v. STATE OF MARYLAND; STEFAN TYSON BELL v. STATE OF MARYLAND

Prior History: [***1] Appeal from the Circuit Court for Anne Arundel County pursuant to certiorari to the Court of Special Appeals. Nancy Davis-Loomis, JUDGE. Pamela L. North, JUDGE.

Bell v. State, 388 Md. 404, 879 A.2d 1086, 2005 Md. LEXIS 529 (2005)

Disposition: IN SURLAND, NO. 8, MOTION TO VACATE CONVICTION AND SENTENCE AND REMAND FOR DISMISSAL OF INDICTMENT DENIED; CASE TO BE CONTINUED FOR 60 DAYS; IF WITHIN THAT PERIOD SUBSTITUTED PARTY IS DULY APPOINTED AND ELECTS TO PROCEED WITH APPEAL, CASE WILL BE RE-SET FOR ARGUMENT ON THE MERITS; OTHERWISE, APPEAL WILL BE DISMISSED AS OF COURSE, COSTS TO BE PAID BY PUBLIC DEFENDER. IN BELL, NO. 45, JUDGMENT OF COURT OF SPECIAL APPEALS VACATED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO CONTINUE CASE FOR 60 DAYS; IF WITHIN THAT PERIOD SUBSTITUTED PARTY IS DULY APPOINTED AND ELECTS TO PROCEED WITH APPEAL, CASE SHALL BE SET FOR ARGUMENT ON THE MERITS; OTHERWISE, APPEAL TO BE DISMISSED, COSTS TO BE PAID BY PUBLIC DEFENDER.

Counsel: ARGUED BY Martha Welshelt and George E. Burns, Jr., Assistant Public Defenders (Nancy S. Forster, Public Defender, on Baltimore, MD) on brief. FOR PETITIONER.

ARGUED BY Sarah Page Pritzlaff, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General of Maryland, of Baltimore, MD) on brief. FOR RESPONDENT.

Judges: ARGUED BEFORE Bell, C.J.; Raker, Wilner, Cathell, Harrell, Battaglia, and Greene, JJ. Opinion by Wilner, J. Bell, C.J.; Dissenting Opinion by Greene, J., which Bell, C.J., and Cathell, J., Join.

Opinion by: Wilner

Opinion

[*19] [**1035] Opinion by Wilner, J.

We are asked in these two cases to revisit what the appropriate response should be when a defendant, convicted in a Circuit Court of a criminal offense, notes a timely appeal to the Court of Special Appeals (or, in a death [***2] penalty case, to this Court) but dies before the appeal is decided.

The law throughout the country seems clear, and by now mostly undisputed, that, if the defendant's conviction has already been affirmed on direct appeal and the death occurs while the case is pending further discretionary review by a higher court, such as on *certiorari*, the proper course is to dismiss the discretionary appellate proceeding and leave the existing judgment, as affirmed, intact. The Supreme Court has adopted that view, and so have we. *See* Dove v. United States, 423 U.S. 325, 96 S. Ct. 579, 46 L. Ed. 2d 531 (1976), overruling, in that regard, Durham v. United States, 401 U.S. 481, 483, 91 S. Ct. 858, 860, 28 L. Ed. 2d 200, 203 (1971); Jones v. State, 302 Md. 153, 158, 486 A.2d 184, 187 (1985).

There is no such consensus when the death occurs during the pendency of an appeal of right, however. From the case law around the country, there seem to be several basic choices on the menu of options:

(1) Dismiss the appeal as moot and direct as well that the entire criminal proceeding, from the charging document through the trial court's judgment, be abated [***3] (voided).

(2) Dismiss the appeal as moot and either expressly leave the trial court's judgment intact or say nothing about the continuing vitality of that judgment (which presumably will either leave the judgment intact or reserve the issue for future litigation).

[*20] (3) Dismiss the appeal as moot, abate the conviction and any purely punitive part of the judgment but allow one or more adjunctive aspects of the judgment, such as an order of restitution and possibly court costs and fines that have already been paid, to remain intact.

(4) Resolve the pending appeal, notwithstanding the death of the appellant, and let the fate of the trial court's judgment be determined by the result of the appeal. A variant of this approach, and perhaps that of (3), is to allow the appeal to continue only if, by reason of an order of restitution or a fine, the appellant's estate has a financial interest in resolving the validity of the judgment and wishes the appeal to continue. A variant of that is to allow the appeal to continue in any case in which a substituted party is appointed and elects to continue the appeal, or counsel of record elects to continue it.

(5) Dismiss the appeal as moot and direct [***4] that a note be placed in the record that the judgment of conviction removed the presumption of the defendant's innocence, that an appeal was noted, and that, because of the death of the defendant, the appeal was dismissed and the judgment was neither affirmed nor reversed.

Each of these options attempts to balance competing public policies, and advantages and disadvantages, justifications and [**1036] non-justifications, have been offered as to each of them. The Federal courts have mostly adopted the first approach, although some, including the Court of Appeals for the Fourth Circuit, have opted for the third, to leave in effect restitution orders, and, in some of the decisions, fines that already have been paid have not been disturbed.

A slight majority of the States that have ruled upon the matter also favor the first approach, although some that would ordinarily abate the entire proceeding have opted to leave restitution orders in place and thus are really in the third category. About twelve State courts have adopted the second option, of either expressly leaving the judgment of conviction intact or dismissing the appeal and saying nothing about that judgment. Approximately seven States [***5] have chosen to proceed [*21] with the appeal if a substituted party elects to do so, and Alabama, so far alone, has chosen the fifth approach, which also leaves the judgment intact. A few courts that have leaned toward the first approach have at least considered whether that approach should be followed if the death was due to suicide - whether a defendant should get the advantage of a full abatement if he or she effectively frustrated the appeal and thus created the problem. Most of those courts have ended up rejecting the distinction. *See United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983)*; also Joseph Sauder, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement Ab Initio Doctrine, 71 Temple L. Rev. 347 (1998)*. Maryland, at this point, is with the majority, although, as we shall explain, this Court has yet really to explore and evaluate the competing public policy considerations and has not expressly determined what to do about restitution orders.

BACKGROUND

Surland

We have consolidated two cases - *Surland* and *Bell*. In May, 2004, Surland was convicted in the [***6] Circuit Court for Anne Arundel County of theft of property under $ 500, for which he was sentenced to one year in jail, all but ten weekends of which was suspended. The offense arose from a shoplifting - stealing about $ 65 worth of razor blades from a drug store. Surland noted an appeal to the Court of Special Appeals, complaining that (1) the trial court erred in admitting evidence that, in attempting to leave the store, he assaulted two store detectives, and (2) the State failed to prove corporate ownership of the stolen items. Before the intermediate appellate court could resolve the appeal, we granted *certiorari*, principally to consider the first issue.

Just prior to scheduled oral argument, Surland died, and defense counsel moved that we vacate his conviction and remand the case with instructions to dismiss the indictment. Counsel advised that, because the trial court had not ordered [*22] restitution, no victim's rights would be affected by such a ruling. The State opposed the motion, urging that we do no more than dismiss the appeal.

Bell

In August, 2003, Bell was convicted in the Circuit Court for Anne Arundel County of first degree murder and conspiracy to commit [***7] first degree murder, for which he was sentenced to consecutive terms of life imprisonment, the imprisonment for the murder being without the possibility of parole. Although the murder

victim's parents apparently followed the case closely, no order of restitution was entered.

Bell noted a timely appeal to the Court of Special Appeals, but, prior to resolution of the appeal, he died. His attorney [**1037] moved to dismiss the appeal and the indictment. The appellate court denied the motion, without prejudice to renewing it upon a showing that no victims' rights would be prejudiced by the granting of the motion and that any victim whose rights would be affected was served with the renewed motion. In April, 2005, counsel filed a renewed motion, seeking the same relief and contending that he was unaware of any victim's right that would be relevant and that there was no requirement in any event to notify victims or victims' representatives.

The State filed a response, noting that the murder victim's parents had been closely involved in the trial proceedings and that they had been informed by the State of counsel's motion to dismiss. The State agreed that the appeal should be dismissed but urged [***8] that the convictions should stand and that the indictment should not be ordered dismissed. Although clearly not parties to the case, at either the trial or appellate level, the victim's parents, through the Maryland Crime Victims' Resource Center (MCVRC), also filed a response in opposition to the motion. They urged that the court not direct the eradication of the conviction or indictment but should instead adopt the view taken by courts in Idaho and Alabama that such a policy would be unfair to crime victims.

[*23] The Court of Special Appeals found potential merit in those responses. By action of its Chief Judge, it entered an order granting the motion to dismiss the appeal but remanded the case to the Circuit Court with instructions "to hold a hearing at which all parties, including the victim's parents, are represented, to determine in the first instance whether [the indictment] should be dismissed."

Bell, obviously through counsel, filed a petition for *certiorari*, seeking review of whether the intermediate appellate court erred in "disregarding the precedents of this Court requiring that when an Appellant dies before resolution of his direct appeal, both the appeal and the indictment [***9] be dismissed," and whether the Chief Judge of the Court of Special Appeals was authorized to act alone in remanding the case for a hearing in the Circuit Court. The State answered the petition, arguing that (1) the order of the Court of Special Appeals was correct, (2) *certiorari* was premature in any event, because the only issue in real dispute - whether the indictment should be dismissed - had not yet been resolved, but was simply remanded for a hearing, and (3) if the Chief Judge was without authority to act alone, the proper relief would be a remand to the Court of Special Appeals for a hearing before a panel of that court.

The parents, through MCVRC, also filed an answer to the petition and a conditional cross-petition of their own. We granted Bell's petition and denied the parents' cross-petition. [1]

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[1] Notwithstanding the denial of their cross-petition, the parents, through MCVRC, filed an "Appellee's" brief in this Court and asked for permission to present oral argument, which we denied. Neither the parents nor MCVRC have any standing or authority to file an answer to the petition, a cross-petition, or a brief, or to present argument, either in this Court or in the Court of Special Appeals. They were not parties in the Circuit Court and they are not parties in the appellate courts. *HN1*[↑] Although in some legal systems crime victims are treated as parties to a criminal proceeding and may participate actively in the proceeding, that is not the case throughout most of the United States, and it is clearly not the case in Maryland. *See Lopez-Sanchez v. State, 388 Md. 214, 224, 879 A.2d 695, 701 (2005); Cianos v. State, 338 Md. 406, 410-11, 659 A.2d 291, 293 (1995).*

The direction in *Art. 47 of the Maryland Declaration of Rights* that crime victims be treated with dignity, respect, and sensitivity during all phases of the criminal justice process, though important, does not suffice to give victims party status in criminal cases or, except to the extent expressly provided by statutes enacted by the General Assembly or Rules adopted by this Court, the right to act as though they were parties. *Maryland Rule 8-111* defines the parties to an appellate proceeding as being "the party" first appealing the decision of the trial court (appellant) and "the adverse party" (appellee). In criminal cases, absent a special intervention for such limited purposes as enforcing a right of public access (*see News American v. State, 294 Md. 30, 40-41, 447 A.2d 1264, 1269-70 (1982); Baltimore Sun v. Colbert, 323 Md. 290, 593 A.2d 224 (1991)*), those parties would be the State and the defendant. The Rule does not afford persons who were not parties in the trial court party status in the appellate court. *Maryland Rules 8-302(c)* and *8-303(d)* make clear that only a party may file a petition for *certiorari* or an answer to such a petition. *HN2*[↑] The proper procedure to be followed by a non-party who wishes to present a point of view to an appellate court is to seek permission to file an *amicus curiae* brief pursuant to *Maryland Rule 8-511*. The Court of Special Appeals should have stricken the MCVRC's response to Bell's renewed motion to dismiss. We shall strike its answer, cross-petition, and "appellee's" brief.

[***10] [*24] [**1038] DISCUSSION

Mootness of the Appeal

As noted, most of the courts, whatever their view as to abating all or part of the judgment, seem to agree that, upon the death of the defendant, the pending appellate proceeding should be dismissed as moot. Few, if any, of them discuss why the appellate proceeding is moot; they just hold that it is, usually for no articulated reason other than that other courts have said so. A few courts have concluded, without much discussion, that they lose jurisdiction when the defendant dies. *See State v. Kriechbaum, 219 Iowa 457, 258 N.W. 110, 113 (Iowa 1934)*. We shall reserve comment on the mootness issue for our discussion of the fourth option.

The Rationales

Two principal rationales have been offered to support the view that, when a defendant dies during the pendency of an appeal of right, the entire criminal proceeding should be abated *ab initio*. The first and predominant one rests on the notion that, when a conviction is appealed, it loses finality until the appeal is resolved and should not be permitted to stand [*25] when the defendant's death prevents the appellate court from adjudicating the validity of the conviction. Courts [***11] have expressed this rationale in different ways, but all to the same effect. [2]

[***12] The second rationale, as articulated in *United States v. Estate of Parsons, 367 F.3d 409, 414 (5th Cir. 2004)*, "focuses on the precept that the criminal justice system [**1039] exists primarily to punish and cannot effectively punish one who has died." Many of the courts adopting the full abatement approach note that justification as well. *See Carver v. State, 217 Tenn. 482, 398 S.W.2d 719, 720 (Tenn. 1966)*:

> "One of the cardinal principles and reasons for the existence of criminal law is to punish the guilty for acts contrary to the laws adopted by society. The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs."

See also People v. Valdez, 911 P.2d 703, 704 (Colo. App. 1996); State v. Holland, 1998 MT 67, 288 Mont. 164, 955 P.2d 1360, 1361 (Mont. 1998).

[*26] A slight majority - and an increasingly smaller majority - of the courts that have considered the matter adopt this full abatement approach. Some of the courts allude to one or both of these rationales for their decision; others give no [***13] reason other than to follow what other courts have done.

Two rationales have also been offered for the opposite view, of dismissing the appeal but leaving either the entire judgment or at least non-punitive aspects of it, such as compensatory restitution orders, intact (Options 2, 3, and 5). The first responds to the view of the courts favoring the full abatement approach that a conviction is not final until the appeal is resolved. It stresses that (1) a conviction erases the presumption of innocence, and (2) trial court judgments are presumed to be regular and valid. After conviction, a defendant is no longer presumed innocent but, indeed, is presumed guilty. *See McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 436, 108 S. Ct. 1895, 1900, 100 L. Ed. 2d 440, 451 (1988)* ("After a judgment of conviction has been entered, however, the defendant is no longer protected by the presumption of innocence."); *Herrera v. Collins, 506 U.S. 390, 399, 113 S. Ct. 853, 859, 122 L. Ed. 2d 203, 216 (1993)*. Convictions therefore *do* have significance and should not be treated as inconsequential simply because the defendant has died. As noted in *Whitehouse v. State, 266 Ind. 527, 364 N.E.2d 1015, 1016 (Ind. 1977)*: [***14]

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[2] *See*, for example, *People v. Valdez, 911 P.2d 703, 704 (Colo. App. 1996)* ("an appeal is an integral part of our system of adjudicating guilt or innocence and defendants who die before the conclusion of their appellate review have not obtained a final adjudication of guilt or innocence"); *United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)* (same); *State v. Hoxsie, 1997 SD 119, 570 N.W.2d 379, 382 (S.D. 1997)*; *Howell v. United States, 455 A.2d 1371, 1372 (D.C. 1983)* ("A judgment of conviction is not considered final until any appeal of right which is filed has been resolved because the possibility of reversal endures until that point"); *State v. Campbell, 187 Neb. 719, 193 N.W.2d 571, 572 (Neb. 1972)* (same); *State v. Marzilli, 111 R.I. 392, 303 A.2d 367, 368 (R.I. 1973)* (same); *State v. Morris, 328 So. 2d 65, 67 (La. 1976)* (interest of defendant's surviving family in preserving reputation of deceased defendant is "of sufficient legal significance to require that a judgment of conviction not be permitted to become a final and definitive judgment of record when its validity or correctness has not been finally determined because the defendant's death has caused a pending appeal to be dismissed"); *United States v. Estate of Parsons, 367 F.3d 409, 414 (5th Cir. 2004)* (appeal tests "previously unforeseen weaknesses in the state's case or outright errors at trial" and "under this rationale, neither the state nor affected parties should enjoy the fruits of an untested conviction").

> "The presumption of innocence falls with a guilty verdict. At that point in time, although preserving all of the rights of the defendant to appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown. To wipe out such a judgment, for any reason other than a showing of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results in the area of survivor's rights in more instances than it would avert an injustice."

See also Wheat v. State, 907 So. 2d 461, 462 (Ala. 2005) ("A conviction in the circuit court removes the presumption of innocence, and the pendency of an appeal does not restore that presumption"); People v. Peters, 449 Mich. 515, 537 N.W.2d 160, 163 (Mich. 1995) ("The conviction of a criminal defendant **[*27]** destroys the presumption of innocence regardless of the existence of an appeal of right. We therefore find it inappropriate to abate a criminal conviction"); State v. Clements, 668 So. 2d 980, 981-82 (Fla. 1996) ("[A] judgment of conviction comes for review with a presumption in favor of its regularity or **[***15]** correctness . . . We therefore conclude . . . that the death of the defendant does not extinguish a presumably correct conviction and restore the presumption of innocence which the conviction overcame").

Although rarely articulated, that view tacitly takes into account and gives credence to two underlying precepts: first, that to obtain the conviction under review, the State was obliged to prove, and presumptively **[**1040]** did prove, each element of the offense, including criminal agency, beyond a reasonable doubt, either to an impartial jury selected in accordance with the legal requirements or to a judge who is presumed to know the law; and second, that, at least where the defendant was represented by presumably competent counsel, every challengeable aspect of the State's case was subjected to scrutiny and challenge.

A second concern expressed by courts in this camp arises from the collateral consequences of abating the judgment in its entirety - principally the eradication of restitution orders entered to compensate victims but also, in some instances, court costs, fines, and limitations on inheritance. That rationale was explicated in State v. Korsen, 141 Idaho 445, 111 P.3d 130 (Idaho 2005), **[***16]** where the court observed that, in light of recent legislation requiring that criminals bear the economic burden of their criminal activity, including restitution to compensate their victims, "a criminal conviction and any attendant order requiring payment of court costs and fees, restitution or other sums to the victim, or other similar charges, are not abated, but remain intact"); United States v. Dudley, 739 F.2d 175 (4th Cir. 1984); Matter of Estate of Vigliotto, 178 Ariz. 67, 870 P.2d 1163, 1165 (Ariz. App. 1993).

The courts impressed with this second rationale, of giving effect to legislative efforts mandating compensation to victims **[*28]** through restitution orders, may differ as to whether the entire judgment should be left intact or only essentially non-punitive compensatory aspects of the judgment, but they are united in opposing the automatic full abatement approach. When joined by those courts that permit the appeal to proceed, which, at least to some extent, is also antithetical to an automatic abatement approach, they may, indeed, represent an equally well-established view disfavoring automatic full abatement.

At least seven States have concluded **[***17]** that the only fair and practical way to resolve the competing concerns or policies is to permit the appeal to proceed, despite the defendant's death, and allow the fate of the judgment to hinge on the result. The courts adopting that approach accept the view of the abatement courts that an appeal of right is an integral part of a defendant's right to a final determination of the merits of the case but also observe that, because of collateral effects of the conviction, including restitution orders, society too has an interest in having a complete review of the merits, once an appeal is noted. This was well explained in Gollott v. State, 646 So. 2d 1297,1304 (Miss. 1994), where, after reviewing the competing points of view and its own prior decisions, the Mississippi court observed:

> "Full review is the only way to preserve the presumption that the conviction is valid until overturned on appeal, while simultaneously preserving the vested right of the criminal defendant to his appeal. This rule also protects society, third parties, and the decedent's estate from being subjected to the force of a hollow conviction - one that remains a presumption for having not been **[***18]** fully adjudicated."

See also State v. Makaila, 79 Haw. 40, 897 P.2d 967 (Haw. 1995); State v. Jones, 220 Kan. 136, 551 P.2d 801 (Kan. 1976); State v. Salazar, 1997 NMSC 44, 123 N.M. 778, 945 P.2d 996 (N.M. 1997); State v. McGettrick, 31 Ohio St. 3d 138, 31 Ohio B. 296, 509 N.E.2d 378, 381 (Ohio 1987) ("It is in the interest of the defendant, the defendant's estate and society that any

challenge initiated by a defendant to the regularity of a criminal proceeding be fully reviewed and decided by the appellate process"); *Commonwealth v. Walker, [*29] 447 Pa. 146, 288 A.2d 741, 742, n.1 (Pa. 1972); Commonwealth [**1041] v. Bizzaro, 370 Pa. Super. 21, 535 A.2d 1130 (Pa. Super. 1987); State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 414 (Wis. 1988).*

Obviously, those courts do not accept the assumed but unexplained, blanket notion that the appeal automatically becomes moot upon the defendant's death and must, for that reason, be dismissed.

There are at least two possible reasons to consider the appeal as moot when the defendant-appellant dies. One is that there is no one to pursue it. That is more obviously [***19] the case, of course, in the extremely rare circumstance, at least in Maryland, where the appellant is appearing *pro se*. Even, as is almost always the case in the Maryland appellate courts, the defendant is represented by counsel, the defendant's death, as a matter of agency law, would ordinarily terminate the lawyer-client relationship and, with that termination, the authority of the erstwhile agent to continue to act for the defendant. *See Brantley v. Fallston Hospital, 333 Md. 507, 511, 636 A.2d 444, 446 (1994); Switkes v. John McShain, 202 Md. 340, 348, 96 A.2d 617, 621 (1953).* In *Brantley*, quoting, in part from *Switkes*, we observed:

> "Ordinarily, under well-established principles of agency law, an agent's authority terminates upon the death of the principal. . . The lawyer-client relationship is not excepted from this rule. . . Thus, we have specifically held that an attorney has no authority to note an appeal on behalf of a client who has died."

If, because of the termination of the agency relationship, the lawyer has no authority to note an appeal on behalf of a client who has died, that termination would presumably abrogate [***20] as well any authority, which exists solely by virtue of the agency relationship, to continue an appeal already noted. That conclusion, which ordinarily would follow from the straightforward application of principles of agency law, does not fit so well in this context, however, for, if we were faithfully to apply that notion, counsel in these cases would have had no authority to move for dismissal of the appeal (and certainly no [*30] authority, in Bell's case, to file a petition for *certiorari*) or to present written or oral argument on behalf of their dead clients. Although we have never applied the Rule in this context, we do note *Maryland Rule 1-331*:

> Unless otherwise expressly provided and when permitted by law, a party's attorney may perform any act required or permitted by these rules to be performed by that party. When any notice is to be given by or to a party, the notice may be given by or to the attorney for that party."

We shall not address here whether, if counsel's authority to file motions and petitions and appear and present argument on behalf of a dead client rests on *Rule 1-331*, that Rule may also provide authority as well to pursue on the client's behalf an [***21] appeal previously noted by the client. [3]

[**1042] In civil cases, if a party dies during the pendency of an appeal, [***22] the Rules provide for the appointment or naming of a substitute party, usually a personal representative, to carry on the appeal. *See Maryland Rules 8-401* and *2-241. Rule 1-203(d)* complements that right by automatically suspending all time requirements applicable to the deceased party from the date of death to the earlier of sixty days after death or fifteen days after the appointment of a personal representative by a court of competent jurisdiction.

Although there are some distinctions in this regard between civil and criminal appeals, *Rule 1-203(d)* applies to civil and criminal proceedings, in both the trial and appellate courts, [*31] and most of the courts that have opted to allow a criminal appeal to continue have invoked their analogues to *Rules 8-401* and *2-241* and permitted a personal representative or other proper person to stand in the shoes of the appellant. *See State v. McGettrick, supra, 509 N.E.2d 378; Gollott v. State, supra, 646 So. 2d 1297; State v. Makaila supra, 897 P.2d 967.* In *State v. Salazar, supra, 945 P.2d 996*, the court appointed defense counsel as the substituted party for purposes of pursuing [***23] the appeal. The

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[3] As a practical matter, the role that the client plays in criminal appeals is very limited. The defendant-appellant can always choose to dismiss the appeal, of course, but that seldom, if ever, happens, and if it does, the judgment will remain intact. In the early stages of an appeal, the defendant may be able to assist his or her attorney in selecting the issues to raise, and occasionally, but rarely, represented defendants will file a *pro se* brief in the Court of Special Appeals. Once the briefs are filed, however, the defendant's role is a minuscule one. The defendant is rarely in court when the case is argued, and, in the Court of Special Appeals, many of the criminal appeals are submitted on brief in any event; there is no oral argument. Other than electing to dismiss the appeal, once the briefs have been filed, there is little or nothing that the defendant can do to influence the decision.

McGettrick and *Gollott* courts (Ohio and Mississippi) did not opt for an automatic continuance of the appeal but instead allowed some time to determine whether either the defendant's estate *or the State* desired to have the appeal continue and, if so, to designate a personal representative as a substituted party. Under their approach, if a substituted party is not named within the time allowed, the appeal is dismissed and all proceedings are abated *ab initio*. Abatement is regarded as a "default."

A second reason why the appellate proceeding may be regarded as moot when the appellant dies is because there is often, though not always, no effective relief that the appellate court can provide. If there is no collectible fine, judgment for court costs, or restitution order and no inheritance rights are affected by the conviction, neither affirmance nor reversal (nor modification) of the judgment will have any practical effect. If affirmed, the judgment cannot be executed; a dead defendant obviously cannot be imprisoned or made to satisfy conditions of probation. If reversed, there can be no retrial and no practical benefit to the defendant. Only where the [***24] appellate decision may affect the prospect of collecting from the defendant's estate or property a fine, costs, or restitution or nullify some impediment to inheritance can there be said to be possible effective relief that the court could provide. If, in a given case, the appellate decision *could* affect the continuing vitality of that aspect of the judgment, the appellate proceeding may not be moot for want of an ability to provide effective relief.

[*32] Existing Maryland Law

The question of what to do when a defendant in a criminal case dies while an appeal of right is pending has been before this Court on a number of occasions. It first surfaced in *Frank v. State, 189 Md. 591, 596, 56 A.2d 810, 812 (1948)*, where two defendants were convicted of bookmaking and appealed. One of the defendants, Frank, died while the appeal was pending. The Court found error in the admission of unlawfully seized evidence and, as to the other defendant, reversed and awarded a new trial. As to Frank, the Court said only "his case abates" and "his appeal will therefore be dismissed." The mandate was "Judgment reversed as to David Mazor, and a new trial awarded. Appeal dismissed [***25] as to Ben Frank." In that case, of course, there could be no retrial of Frank in any event, so abatement was simply a recognition of reality. In [**1043] announcing that result, the Court cited *List v. Pennsylvania, 131 U.S. 396, 9 S. Ct. 794, 33 L. Ed. 222 (1888)* and *Menken v. Atlanta, 131 U.S. 405, 9 S. Ct. 794, 33 L. Ed. 221 (1889)*, both criminal cases in which the appellant died while appeals were pending before the Supreme Court on writ of error, in which the Court, when apprised of the death, stated that the cause "has abated" and dismissed the writ of error.

The issue arose again in *Porter v. State, 293 Md. 330, 444 A.2d 50 (1982)* and *Thomas v. State, 294 Md. 625, 451 A.2d 929 (1982)*. In both cases, the appellant died after his conviction had been affirmed by the Court of Special Appeals and while the matter was pending in this Court following the grant of *certiorari*. On consent motions, in one case filed by the State and in the other by defense counsel, in which both sides stipulated that the convictions should be vacated and the indictments dismissed as moot, this Court granted that relief.

In *Jones v. State, 302 Md. 153, 486 A.2d 184 (1985)*, [***26] however, where that issue was contested, we declined to follow *Porter* and *Thomas* and instead adopted the Supreme Court's view in *Dove v. United States, supra, 423 U.S. 325, 96 S. Ct. 579, 46 L. Ed. 2d 531*, that, when the death occurs following an affirmance of the conviction and while the matter is pending [*33] discretionary review, the proper response is simply to dismiss the appellate proceeding as moot and allow the trial court judgment, as affirmed, to stand. When *Jones* was decided, the clear majority rule, in both the Federal and State courts, was that, when death occurs during the pendency of an appeal of right, the entire criminal proceeding should be abated. Many of the cases departing from that view had not yet been decided; only two, *State v. Morris, supra, 328 So. 2d 65*, and *Whitehouse v. State, supra, 364 N.E.2d 1015*, were even mentioned, in a footnote, *302 Md. at 157, n.1, 486 A.2d at 186, n.1*. After reviewing the cases distinguishing appeals of right from cases pending discretionary review, the Court announced its agreement with that distinction and observed:

> "Where the deceased criminal defendant [***27] has not had the one appeal to which he is statutorily entitled, it may not be fair to let his conviction stand. But, on the other hand, where the right of appeal has been accorded and the Court of Special Appeals has decided that there was no reversible error, no unfairness results in leaving the conviction intact even though an application for further review has not been resolved when the defendant dies. The mere possibility that this Court might have reversed the conviction is not sufficient ground to order dismissal of the entire indictment."

Id. at 158, 486 A.2d at 187.

In Russell v. State, 310 Md. 96, 527 A.2d 34 (1987), the issue arose in a different context. After a verdict of guilty was returned, the trial court granted the defendant's motion for new trial. The defendant then moved to dismiss the indictment, contending that the grant of a new trial amounted to a determination that the evidence presented at the first trial was legally insufficient and a retrial would constitute placing him in double jeopardy. That motion was denied, an appeal was taken, the Court of Special Appeals affirmed, this Court granted *certiorari*, and the [***28] defendant died while the case was pending here. Distinguishing *Jones*, we concluded that there had never been a judgment of conviction and that, when [*34] Russell died, his status was that of a defendant awaiting trial. Without citing any authority, the Court stated that "where the accused dies while awaiting prosecution *or while a direct appeal is pending*, the prosecution [**1044] will abate, and if there has been a conviction it will be abated." (Emphasis added). The italicized language is, of course, relevant in these appeals, although it was obviously *dicta* in *Russell*.

The case that clearly places Maryland in the abatement camp is Trindle v. State, 326 Md. 25, 602 A.2d 1232 (1992). Trindle was convicted in Circuit Court and appealed to the Court of Special Appeals. As is the case with Surland, we granted *certiorari* prior to any decision by the intermediate appellate court and Trindle died while the case was pending here. Noting that fact and citing only *Jones*, which was not directly on point, we held that "all issues [Trindle] had raised are moot" and that, as he had not had the one appeal to which he was entitled, "his convictions and sentences shall [***29] be vacated, and the cases remanded with directions to dismiss the criminal informations filed against him as moot." *Id. at 30, 602 A.2d at 1234*. The question now before us is whether to overrule that aspect of *Trindle* and adopt a different approach.

Conclusion

Although the holding in *Trindle* is certainly precedent, this is the first time that this Court has really examined the different approaches and competing policies in the light of the current landscape, a landscape that is not entirely the same as it was when *Jones* and *Trindle* were decided. We are convinced that neither of the two rigid polar approaches - automatic abatement of the entire criminal proceeding *ab initio* or dismissing the appeal and leaving the judgment intact without any prospect of critical review - constitutes a proper balance of equally important concerns. The former disregards entirely the presumptive validity of the conviction, which, for the reasons already noted, should not be so casually ignored. [4] On [*35] the other hand, whether or not a conviction should be regarded as non-final once an appeal is filed, as the abatement *ab initio* courts seem to assume, it [***30] certainly is subject to reversal, vacation, or modification if the appellate court finds merit in any of the challenges made by the appellant, and, despite the low rate of actual success on direct appeal, the court should not dismiss that possibility out of hand.

Because, [***31] in Maryland, fines and costs are part of the criminal judgment, as is restitution (*see* Grey v. Allstate, 363 Md. 445, 769 A.2d 891 (2001)), we can find no justifiable basis in Maryland law for the third approach, of parsing the judgment of conviction, vacating certain parts but not others. If either of the rationales for abatement *ab initio* are to prevail, the entire judgment must be vacated.

HN3[↑] We concur, in part, with those courts that permit the appeal to continue, if the defendant's estate wishes it to continue. We do not agree that *the State* should be empowered to have a substituted party appointed for the defendant, however, and, by that device, cause the defendant's appeal to continue when the defendant's estate does not wish it so. In furtherance of that view, we do not agree that abatement *ab initio* should be the default. That, in [**1045] our view, is not at all the proper balance; indeed, there would be little or no incentive for the defendant's estate to opt to continue the appeal if, by not doing so, there will be a full abatement. The presumption that the judgment of conviction is valid should permit it to remain in effect unless, at the *defendant's* [***32] election, exercised by a substituted party appointed by the defendant's estate for the defendant's benefit, the appeal continues and results in a reversal, vacation, or modification of the judgment.

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[4] The presumption of validity, which is a legal precept, is consistently confirmed empirically. The most recent Annual Reports of the Maryland Judiciary (FY 2001 through 2004) show that only nine to fourteen percent of the criminal appeals to the Court of Special Appeals result in reversals, either in whole or in part - that 64% to 67% of the judgments are affirmed, 13% to 18% of the appeals are dismissed, and 4% to 9% result in some other disposition. The success rate in appeals of right is quite low. Indeed, ironically, the reversal rate is much higher in this Court on *certiorari* review - between 38% and 60% in the same four-year period - yet, if the defendant dies while the case is pending in this Court, the judgment will remain intact.

[*36] We opt for the following: HN4[↑] Upon notice of the death of the appellant and in conformance with Md. Rule 1-203(d), all time requirements applicable to the deceased defendant and the setting of the case for argument (if that has not already occurred) will be automatically suspended in order to allow a substituted party (1) to be appointed by the defendant's estate, and (2) to elect whether to pursue the appeal. If a substituted party is appointed and elects to continue the appeal, counsel of record will remain in the case, unless the substituted party, contemporaneously with the election, obtains other counsel. If no substituted party comes forth within the time allotted by Rule 1-203(d) and elects to continue the appeal, it will be dismissed, not for mootness but for want of prosecution, and, as with any appeal that is dismissed, the judgment will remain intact.

Although none of the various approaches is perfect, this one, it seems to us, comes the closest. It preserves both the presumptive [***33] validity of the judgment and the ability of the defendant, through a substituted party appointed for his or her benefit, to maintain the defendant's challenge to it. It protects the interests of both parties and of the public generally and, because there are so very few instances in which the problem arises, should create no appreciable burden for anyone. [5] No matter which approach is taken, the defendant, who is dead, can suffer no further punishment and reap no further reward, whether the judgment is vacated or not. If the defendant's survivors wish to pursue the appeal, to preserve the defendant's estate against a claim for some fine, costs, or restitution, to clear the defendant's record and reputation, or to vindicate some legal principle that was important to the defendant, they should be free to do so in place of the defendant, who would have maintained the appeal had he or she survived. *If no substituted party wishes to proceed, no [*37] one is hurt if the appeal is dismissed and the judgment remains intact, as it would with any dismissal.* Because counsel, whether private counsel or the Public Defender, is usually already in the case and, but for the appellant's death, would [***34] be obliged to see it through, we see no reason why, unless a substituted party obtains other counsel, counsel already of record should not continue to prosecute the appeal, as they were employed or appointed to do.

IN *SURLAND*, NO. 8, MOTION TO VACATE CONVICTION AND SENTENCE AND REMAND FOR DISMISSAL OF INDICTMENT DENIED; CASE TO BE CONTINUED FOR 60 DAYS; IF WITHIN THAT PERIOD SUBSTITUTED PARTY IS DULY APPOINTED AND ELECTS TO PROCEED WITH APPEAL, CASE WILL BE RE-SET FOR ARGUMENT ON THE MERITS; OTHERWISE, APPEAL WILL BE DISMISSED AS OF [1046] COURSE, COSTS TO BE PAID BY PUBLIC DEFENDER.**

IN *BELL*, NO. 45, JUDGMENT OF COURT OF SPECIAL APPEALS VACATED; CASE REMANDED TO THAT [*35] COURT WITH INSTRUCTIONS TO CONTINUE CASE FOR 60 DAYS; IF WITHIN THAT PERIOD SUBSTITUTED PARTY IS DULY APPOINTED AND ELECTS TO PROCEED WITH APPEAL, CASE SHALL BE SET FOR ARGUMENT ON THE MERITS; OTHERWISE, APPEAL TO BE DISMISSED, COSTS TO BE PAID BY PUBLIC DEFENDER.**

Dissent by: Greene

Dissent

Dissenting Opinion by Greene, J., which Bell, C.J., and Cathell, J., Join

Respectfully, I dissent:

The majority seems to acknowledge that, for more than fifty-seven years, the law in Maryland has been that if the a defendant dies during the pendency of an appeal of right, as opposed to a discretionary appeal, the appeal is dismissed as moot, the conviction is vacated and the underlying indictment, [*38] as well, is dismissed as moot. Trindle v. State, 326 Md. 25, 602 A.2d 1232 (1992); Jones v. State, 302 Md. 153, 158, 486 A.2d 184, 187 (1985) (noting that it is unfair to let a conviction stand "where the deceased criminal defendant has not had the one appeal to which he is statutorily entitled . . ."); Russell v. State, 310 Md. 96, 527 A.2d 34 (1987); Frank v. State, 189 Md. 591, 56 A.2d 810 (1948). Further, the majority points out that, [***36] because the defendant's appeal is dismissed as moot, it may not be fair and in the interest of justice to let his conviction stand.

The rule followed by the majority of state and federal jurisdictions is that when a criminal defendant files an

[5] Although a substituted party obviously cannot be subjected personally to any punitive or monetary aspect of the judgment of conviction rendered against the defendant, that party may become liable for appellate court costs, as the defendant would have, if the judgment is affirmed and the appellate court assesses costs in the normal manner.

appeal of right and dies pending the appeal of his or her conviction, the appeal is dismissed and the prosecution abates *ab initio*. *See* Tim A. Thomas, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction - Modern Cases*, 80 A.L.R.4th 189 (1990) (for a collection of the states following this majority rule). *See also* United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (explaining that the interests of justice require that the conviction not stand without determination of the merits of an appeal).

In my view, because petitioners, Surland and Bell, filed appeals of right that were undecided at the time of their deaths, their convictions were not entitled to any degree of finality as a matter of law. Pursuant to Maryland statutory law, both defendants were entitled, as a matter of right, to appeal their convictions. See Md. Code (1974, 2002 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article. [***37] In the interests of justice their convictions should not stand without a resolution of the merits of their appeals and any resolution is impossible by virtue of their deaths. See People v. Matteson, 75 N.Y.2d 745, 551 N.E.2d 91, 92, 551 N.Y.S.2d 890 (N.Y. 1989) (holding that a defendant's suicide while his appeal of right was pending abates the appeal and all proceedings in the prosecution from its inception because "the death places a defendant beyond the court's power to enforce or reverse the judgment of conviction, thereby preventing effective appellate review of the validity of the conviction") (citations omitted) [*39] . A majority of the federal courts of appeal have concluded that an appeal of right is an integral part of the system for adjudicating guilt or innocence, and if a defendant dies before appellate review is completed, the defendant has not obtained final adjudication of the appeal. See United State v. Pogue, 305 U.S. App. D.C. 224, 19 F.3d 663, 665 (D.C.Cir.1994) (recognizing [**1047] the holdings of the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits affirming that abatement *ab initio* is the law). The universal rationale for [***38] holding that death abates all proceedings in the prosecution from its inception seems to be that "the interests of justice ordinarily require that . . . [a defendant] not stand convicted without resolution of the merits of his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence." United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (citing Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956)).

Recently, the Supreme Court of Alabama applied the abatement rule to a case involving the death of a criminal defendant occurring during the course of an appeal of right. The court held that the defendant's conviction abated upon his death. Ex parte Estate of Cook, 848 So. 2d 916 (Ala. 2002). [1] The Supreme Court of Alabama acknowledged that states have provided various policy reasons in support of the abatement rule:

> Our review of the jurisprudence of other states shows that a majority follow this same rule, and some have provided [*40] compelling policy reasons in support thereof. *See* People v. Robinson, 187 Ill. 2d 461, 719 N.E.2d 662, 663, 241 Ill. Dec. 533 (Ill. 1999) [***39] ("the purpose of criminal prosecutions is to punish the defendant; continuing criminal proceedings when the defendant is dead is a useless act"); State v. Holland, 1998 MT 67, 288 Mont. 164, 955 P.2d 1360, 1362 (Mont. 1998) (adopting rationale for abating criminal proceeding upon defendant's death set forth by the Arizona Supreme Court "that the interests of the state in protecting society have been satisfied, the imposition of punishment is impossible, and further collection of fines or forfeiture would result in punishing innocent third parties"); State v. Hoxsie, 1997 SD 119, 570 N.W.2d 379, 382 (S.D. 1997) ("Mere dismissal of the appeal, without abatement of the proceedings *ab initio*, would permit a judgment to stand that is not final."); Gollott v. State, 646 So. 2d 1297, 1300 (Miss. 1994) ("What is obvious is that society needs no protection from the deceased . . . . Moreover, other potential criminals will be no less deterred from committing crimes. In the abatement *ab initio* scheme, the judgment is vacated and the indictment is dismissed, but only because the convicted defendant died. Surely this would not give peace of mind to the [***40] criminally

[1] In *Cook*, the defendant died while in the course of his appeal *de novo* to the circuit court. Subsequently, in Wheat v. State, 907 So. 2d 461 (Ala. 2005) the Alabama Supreme Court distinguished the facts in *Cook* and held that where the defendant died, while an appeal was pending in the appellate court, death abates the appeal. On remand, the court in *Wheat* directed the trial court to note in the record the fact of the defendant's conviction, and that the conviction was appealed, but it was neither affirmed nor reversed. In *Wheat*, the court applied Ala. Rule 43(a), which was not applicable in *Cook*, to resolve the issue of abatement on a case by case basis. Rule 43(a) provides that "when the death of a party has been suggested, the proceeding *shall not abate*, but shall continue or be disposed of as the appellate court may direct." Wheat, 907 So. 2d at 464 (Harwood, J. concurring).

inclined."); State v. McClow, 395 So. 2d 757, 758 (La. 1981) (abatement has as its purpose "serving the interest of the surviving family in preserving, unstained, the memory of the deceased defendant or his reputation"); State v. Griffin, 121 Ariz. 538, 592 P.2d 372 (Ariz. 1979) (rational adopted in State v. Holland, supra); State v. Carter, 299 A.2d 891, 895 (Me. 1973) ("By such principle of abatement, *ab initio*, there is avoided, likewise, danger of any potential collateral carry-over to affect personal or property rights of [**1048] survivors of the deceased defendant or other persons.").

Ex parte Cook, 848 So. 2d at 918-19 (parallel citations omitted) (footnote omitted).

[***41] Presumably, because an appeal is an integral part of our criminal justice system, the majority appears motivated to overrule *Trindle*, and its progeny, and hold that a defendant's appeal continues even after death. This approach has been criticized by at least one jurist as a court, apparently, seeking [*41] to extend its grasp over criminal defendants beyond the grave, i.e., "from here to eternity." State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 416 (Wis. 1988) (Day, J. dissenting) (recognizing that death ended the appellate court's jurisdiction over the criminal defendant and that allowing the appeal to continue after his death will not vindicate the defendant). In that case, a majority of the Supreme Court of Wisconsin held that the appropriate remedy when a defendant dies "while pursing postconviction relief" is not to abate the criminal proceedings *ab initio* but to allow the appeal to continue regardless of the cause of the defendant's death because the defendant is entitled to a final resolution of his appeal. McDonald, 424 N.W.2d at 414-415.

In support of its holding in the present case, the majority advances the following reasons to [***42] justify changing the law: it is in the interests of justice and protects the interests of the public to continue the appeal after the defendant's death; the decedent or those who survive him should have the opportunity for "vindication" by allowing the appeal to go forward; the conviction appealed from is presumptively valid; abatement *ab initio* should not be the default; and the Court should not dismiss the possibility, out of hand, that the defendant's conviction on appeal might be reversed, vacated, or modified. Yet, in the same context, the majority acknowledges that the defendant "can suffer no further punishment and reap no reward, whether judgment is vacated or not," it is willing to permit the "defendant, through a substituted party appointed for his or her benefit, to maintain the defendant's challenge to . . . [the judgment]." Maj. op. at 22, __ A.2d at __.

It is not clear to me the specific societal interests that the majority deems are in need of protection. If the real interests that the majority seeks to protect are the interests of victims and witnesses, then, in my view, the Legislature is better able to craft a rule than this [***43] Court to address the "rights" of all victims and witnesses. If, however, the majority is alluding to the public's trust and confidence in the criminal justice system, it seems to me that the public would tend to have less confidence in a system that creates a fiction allowing the [*42] defendant to continue to pursue an appeal from the grave while not allowing victims of crimes to pursue any postmortem remedies in the criminal case.

The reality is, and should be, that death terminates the appeal. Even if the conviction is upheld or reversed after the defendant's death, it is of no benefit or detriment to the defendant who is dead or to those who cherish his or her memory. For example, assume it is determined on appeal that "an error occurred in the trial warranting a new trial. Does that 'vindicate' the defendant? Hardly. There [will] not . . . be a determination that the defendant was 'not guilty.' The issue will never be retried [,]" and the deceased could never be vindicated or found not guilty. McDonald, 424 N.W.2d. at 416 (Day, J. dissenting). It is better for all concerned to recognize that the matter is moot because the defendant, upon death, can suffer no further [***44] punishment and reap no reward, whether judgment is vacated or not. In my view, there is no legitimate purpose to be served in permitting the [**1049] appeal to continue after the defendant's death.

In other words, when the defendant dies pending his appeal the appeal should be dismissed as moot because the defendant is no longer subject to the jurisdiction of the court. When a defendant dies, the State's interest in the "protection of society has been satisfied, the imposition of punishment is impossible, and [the] collection of fines or forfeiture [will] result in [the] punish[ment of] innocent third parties." Griffin, 592 P.2d at 373. Further, "when a financial penalty is imposed upon a defendant, it is unfair to punish defendant's family by making the family pay the defendant's fine by virtue of an assessment against the estate." MacDonald, 424 N.W.2d at 413 (discussing concurring opinion by J. Sundby in State v. Krysheski, 119 Wis. 2d 84, 349 N.W.2d 729, 731 (Wis. 1984));

People v. Mazzone, 74 Ill. 2d 44, 383 N.E.2d 947, 949, 23 Ill. Dec. 76 (Ill. 1978) (holding that a fine imposed as punishment on the defendant, [***45] and there is a pending appeal, upon his death there is no justice in punishing his survivors for his offense). An appeal automatically becomes moot upon the defendant's death because the defendant is not available to pursue the [*43] appeal and often there is no effective relief that the appellate court can provide. *See Mazzone, 383 N.E.2d at 950*. The court in *Robinson*, upholding *Mazzone*, reaffirmed that "the purpose of criminal prosecutions is to punish the defendant; that to continue criminal proceedings when the defendant is dead is a useless act," *Robinson, 719 N.E.2d at 663* (citing *Mazzone, supra*) and that "once the defendant has ceased to be, an appeal cannot effectively confer vindication or impose punishment." *Mazzone, 383 N.E.2d at 949*. Further, the court in *Robinson* held that the interests of victims and witnesses are immaterial to abatement *ab initio* unless the Legislature deems otherwise. *See Robinson, 719 N.E.2d at 663-64*.

The circumstances surrounding the Bell and Surland appeals do not warrant a modification of Maryland law. It serves no meaningful purpose to decide an appeal after the [***46] defendant's death in a criminal case. Substituting a party to act on behalf of the defendant will unnecessarily complicate the resolution of the case. The primary objectives of a criminal prosecution resulting in a conviction and punishment are: (1) to protect society and imprison the guilty and dangerous defendant; (2) to deter the criminal defendant and potential criminals from performing similar conduct; (3) to rehabilitate the criminal defendant; and (4) to obtain retribution from the criminal defendant as a means of satisfying society's sense of revenge. Application of the rule of abatement *ab initio* is consistent with these objectives; however to allow a substituted party, appointed after the defendant's death, to maintain the defendant's challenge to the judgment is remarkably inconsistent with the primary objectives of the criminal justice system and should not be allowed. Therefore, I dissent. I would reverse the judgment of the Court of Special Appeals in *Bell* and remand the case with instructions to abate the conviction *ab initio*. In addition, I would grant the motion in the *Surland* case and remand the matter with directions to abate the conviction *ab initio* [***47] .

Chief Judge Bell and Judge Cathell have authorized me to say that they join in this dissent.

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State v. Korsen

Supreme Court of Idaho

April 1, 2005, Filed

Docket No. 31016, 2005 Opinion No. 49

Reporter
141 Idaho 445 *; 111 P.3d 130 **; 2005 Ida. LEXIS 66 ***

STATE OF IDAHO, Plaintiff-Respondent, v. DAVID WILLIAM KORSEN, Defendant-Appellant.

Subsequent History: Released for Publication: April 25, 2005.

Prior History: [***1] Appeal from the District Court of the Fourth Judicial District of the State of Idaho, for Ada County. Hon. Michael R. McLaughlin, District Judge. On review from the Idaho Court of Appeals.

State v. Korsen, 2004 Ida. App. LEXIS 8 (Idaho Ct. App., Jan. 21, 2004).

Disposition: Motion to abate ab initio all criminal proceedings against Appellant, denied; motion to dismiss appeal, granted.

Counsel: Molly J. Huskey, State Appellate Public Defender, Boise, for appellant. Eric D. Fredericksen argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent. Lori A. Fleming argued.

Judges: JONES, Justice Chief Justice SCHROEDER, Justices TROUT and EISMANN, and Justice CAREY Pro Tem, CONCUR.

Opinion by: JONES

Opinion

[*445] [**130] JONES, Justice.

The State requested review of a decision of the Idaho Court of Appeals, granting the State Appellate Public Defender's (SAPD's) motion to abate *ab initio* all criminal proceedings against David William Korsen. Korsen had been sentenced to concurrent unified sentences of fifteen years and ordered to pay court costs and fees after being convicted on two counts of second degree kidnapping. Korsen died while his appeal was pending. We hold that abatement applies only to the custody or incarceration provisions of a judgment of conviction, and that [***2] Korsen's conviction and order of restitution remain intact.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Korsen was found guilty by a district court jury of two counts of kidnapping in the second degree, *Idaho Code § 18-4501(2)* and *18-4503*, for withholding his children from their mother for approximately two months [**131] [*446] in violation of a custody order. Korsen was sentenced to concurrent unified sentences of fifteen years, with two and one-half years determinate, and ordered to pay court costs and fees in the sum of $ 13,773.53, including $ 13,685.03 in restitution pursuant to *Idaho Code § 19-5304*. [1] No fine was imposed. Korsen appealed from his judgment of conviction and sentence. The appeal was assigned to the Idaho Court of Appeals on March 11, 2003. Korsen was released from the Department of Corrections and placed on parole. On March 31, 2003, the Court of Appeals issued an order approving the parties' stipulation to submit the case for decision on the briefs.

[***3] Korsen was found dead of apparent suicide on or about July 16, 2003. The SAPD filed a motion to abate *ab initio* all criminal proceedings against Korsen. The State opposed that motion, and countered with a motion to dismiss Korsen's appeal, which, if granted, would have had the effect of leaving the underlying conviction intact. The Court of Appeals held that abatement *ab initio* is the law of Idaho, granted the

[1] In addition to the restitution, Korsen was ordered to pay $ 32.50 in court costs (*I.C. § 31-3201A*), $ 6 for the peace officers standards and training fund (*I.C. § 31-3201B*), and $ 50 to the victims' compensation fund (*I.C. § 72-1025*).

SAPD's motion to abate *ab initio*, and denied the State's motion to dismiss. The State filed a Petition for Review which was accepted by this Court on August 10, 2004. The State asserts the SAPD did not have the authority to file the motion to abate and that the Court of Appeals erred when it granted the motion to abate *ab initio*.

II.

ANALYSIS

HN1[↑] When considering a case on review from the Court of Appeals, this Court gives serious consideration to the Court of Appeals decision. *Leavitt v. Swain, 133 Idaho 624, 627, 991 P.2d 349, 352 (1999)*. We exercise free review over matters of law. *Iron Eagle Dev., LLC v. Quality Design Systems, Inc., 138 Idaho 487, 491, 65 P.3d 509, 513 (2003)*.

A. Korsen's Attorney Had The [*4] Authority To File The Motion To Abate.**

The State asserts that Korsen's death terminated appellate counsel's authority to act on his behalf and divested the appellate court of jurisdiction to do anything other than dismiss the appeal. The State contends the only means that would have allowed appellate counsel to continue to represent Korsen's interests would have been to substitute a third party in Korsen's place under *I.A.R. 7*. The SAPD argues *I.A.R. 7* does not apply to criminal cases and that appellate counsel had the authority, and was obligated, to act on behalf of Korsen.

The State cites *McCornick v. Shaughnessy, 19 Idaho 465, 114 P. 22 (1911)*, to support its contention that appellate counsel did not have authority to act on Korsen's behalf following his death. In *Shaughnessy*, judgment was rendered in favor of the plaintiff, and the attorneys who had represented the defendants at trial filed a notice of appeal. *Id. at 467, 114 P. at 22 (1911)*. After the appeal was perfected, the defendant died but no substitution was made in the case. *Id.* After noting that the attorneys who filed the appeal on behalf of Shaughnessy had apparently thereafter [***5] withdrawn and that a new attorney, who had no connection with the case prior to Shaughnessy's death, was now purporting to represent Shaughnessy, this Court dismissed the appeal. *Id. at 469, 114 P. at 23*. The Court stated that an attorney's authority in an action ceases upon the death of the client and that the attorney may not proceed without the substitution of a representative who can authorize him to do so.

The State acknowledges that *Shaughnessy* was a civil action, but argues that *I.A.R. 7*, which governs substitution of a party following the death or disability of a party, also applies to criminal cases. *Rule 7* provides:

> Upon the death or disability of a party to a proceeding governed by these rules, or upon the assignment, transfer, or the accession to the interest or office of party to a proceeding governed by these rules by another person, the representative, or successor [**132] [*447] in interest of such party shall file a notification of substitution of party and serve the same on all parties to the proceeding or appeal.

The State claims the rule extends to criminal cases because the rule states it applies to proceedings "governed by these rules" and criminal [***6] cases are governed by the Idaho Appellate Rules. The State cites *U.S. v. Dwyer, 855 F.2d 144 (3d Cir. 1988)*, as an example of a criminal case in which the court held the attorneys lost the authority to act on behalf of their client after his suicide. The Third Circuit held that the attorneys who had represented Dwyer "lacked the legal authority to act as his agents after his death and thus had no standing to move to abate his conviction" following Dwyer's suicide, which occurred after his conviction and prior to his sentencing. *U.S. v. Dwyer, 855 F.2d 144, 145 (3d Cir. 1988)*. However, in 2001 the Third Circuit suggested that the issue of appellate court jurisdiction is not present where the defendant dies after appealing, as is the situation here, as opposed to before an appeal has been filed, as was the case in *Dwyer*. *U.S. v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001)*. The court held that *Dwyer* is "clearly distinguishable from a situation in which the defendant dies after appealing the entry of a judgment of sentence." *Id.*

The SAPD argues that no substitution is required in a criminal case where the defendant dies [***7] while an appeal is pending. The SAPD notes that the right of an attorney to withdraw from representation of a client differs greatly, depending on whether the case is a criminal or civil matter. An attorney in a criminal case may not withdraw from representation of a defendant without leave of court under *I.C.R. 44.1. Rule 44.1* provides:

> *HN2*[↑] No attorney may withdraw as an attorney of record for any defendant in any criminal action without first obtaining leave and order of the court upon notice to the prosecuting attorney and the defendant except as provided in this rule. Leave to withdraw as the attorney of record for a defendant

> may be granted by the court for good cause. Provided, an attorney may withdraw at any time after the final determination and disposition of the criminal action by the dismissal of the complaint or information, the acquittal of the defendant, or the entry of a judgment of conviction and sentence; but in the event of conviction an attorney may not withdraw without leave of the court until the expiration of the time for appeal from the judgment of conviction.

From this, the SAPD asserts that appellate counsel not only had the right to file the motion [***8] to abate, but also had the obligation to continue to act in Korsen's best interests. It is argued this obligation could only be terminated at the final determination and disposition of the criminal action or following a motion and showing good cause. The SAPD urges this Court to agree with the South Dakota Supreme Court when it stated:

> There is no statute or provision of the state constitution that provides for disposition of a criminal appeal in the event of the death of a defendant pending that appeal. Our state's statutes allowing substitution of a party in the event of the party's death, SDCL 15-6-25 (a)–(e), have heretofore been applied only to civil litigation and, under the present statutory scheme, cannot be construed to apply to criminal appeals.

State v. Hoxsie, 1997 SD 119, 570 N.W.2d 379, 379-80 (S.D. 1997). Like the Idaho rule that governs substitution, the statute referred to by the South Dakota Supreme Court does not specifically state that it only applies to civil actions.

Of further interest in this regard is the fact that *HN3*[↑] *I.R.C.P. 25(a)* specifically provides for the substitution of a successor or representative of a deceased party in a civil [***9] action. The Idaho Criminal Rules contain no comparable provision. *Idaho Appellate Rule 7* appears to be the appellate counterpart of *I.R.C.P. 25(a)*. Both rules are primarily designed to allow for the substitution of a successor or representative to carry on and conclude civil litigation upon the death of a deceased party.

In this case, no issues of a civil nature have been presented on appeal. Korsen has not directly challenged the restitution order. Thus, we do not address the questions of whether a representative or successor may [**133] [*448] challenge a restitution order following the death of a convicted criminal appellant or whether substitution is required or appropriate in such a matter. We hold that *HN4*[↑] substitution under *I.A.R. 7* is not necessary in the circumstances of this case, where the attorney for the deceased criminal appellant has not been granted leave to withdraw and merely wishes to conclude the criminal proceeding.

B. Korsen's Death Does Not Require Abatement Of The Conviction.

Having concluded that the motions of the parties are properly before the Court, we now turn to consideration of whether the death of a convicted criminal appellant requires abatement *ab initio* [***10] of all criminal proceedings. The only case on point is *State v. Stotter, 67 Idaho 210, 175 P.2d 402 (1946)*, where this Court appears to have embraced the doctrine of abatement *ab initio*. The parties disagree regarding the holding in *State v. Stotter*. In that case, Stotter was convicted of knowingly permitting the sale of intoxicating liquors on his premises in violation of the Boise City Code. *Id. at 212, 175 P.2d at 402*. He was sentenced to thirty days in jail and ordered to pay a $ 300 fine. Stotter appealed but died while his appeal was pending. This Court held that the judgment imposing the $ 300 fine abated upon his death. *Id. at 214, 175 P.2d at 404*. The State argues this Court did not adopt the doctrine of abatement *ab initio* because it was not presented with the question of whether Stotter's conviction abated, the only issue was whether the portion of the judgment imposing the fine abated. The SAPD argues this Court followed the doctrine of abatement *ab initio* and that the doctrine is the controlling law in Idaho. The *Stotter* opinion concludes, "It is adjudged that all proceedings in this case have permanently [***11] abated, and that the district court of Ada County enter an appropriate order to that effect." *Id.*

The Court's rationale for abating the fine is of particular interest. It was noted that the fine was imposed for punishment, not compensation, and that the death of the convicted appellant eliminated the need for punishment. The Court stated:

> In case where a fine is imposed as a punishment, no principle of compensation is involved. A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment. There could be no justice in enforcing a fine against the estate of an offender, for such a course would punish only the family or those otherwise interested in the estate.

Id. at 213-14, 175 P.2d at 403 (quoting *Blackwell v.*

State, 185 Ind. 227, 113 N.E. 723 (Ind. 1916)). Since no public policy would have been served by refusing to abate the punishment, the criminal proceedings were abated.

The SAPD correctly asserts that "of the states that have addressed the issue, abatement *ab initio* continues to be the preferred disposition." State v. Wheat, So. 2d , 907 So. 2d 461, 2005 Ala. LEXIS 3, 2005 WL 32315, [***12] *2 (Ala., Jan. 7, 2005) (quoting People v. Robinson, 298 Ill. App. 3d 866, 699 N.E.2d 1086, 1091, 232 Ill. Dec. 901 (Ill. App. 3d 1998)). However, when reviewing the most recent cases, it is apparent that the trend has been away from abating a deceased defendant's conviction *ab initio*. *See id.*; People v. Ekinici, 191 Misc. 2d 510, 743 N.Y.S.2d 651, 657 (N.Y. Sup. Ct. 2002); State v. Hoxsie, supra; State v. Salazar, 1997 NMSC 44, 123 N.M. 778, 945 P.2d 996 (N.M. 1997); State v. Clements, 668 So. 2d 980 (Fla. 1996); People v. Peters, 449 Mich. 515, 537 N.W.2d 160 (Mich. 1995); State v. Makaila, 79 Haw. 40, 897 P.2d 967 (Haw. 1995); State v. Christensen, 866 P.2d 533, 536-537 (Utah 1993); Perry v. State, 575 A.2d 1154 (Del. 1990). The Supreme Court of Alabama recently noted, "*We expect this trend will continue as the courts and public begin to appreciate the callous impact such a procedure necessarily has on the surviving victims of violent crime.*" State v. Wheat, supra at *2 (italics in original) (quoting Robinson, 699 N.E.2d at 1092).

The Alabama Supreme Court held in *State v. Wheat* that [***13] the defendant's death pending appeal did not operate to abate his convictions *ab initio*. Id. at *3. In that case, the defendant had been convicted of five counts of capital murder and died while [**134] [*449] his appeal was pending. Id. at *1. The court noted in its discussion:

> In a case such as this one, the conviction has not been tested on appeal, yet abating it *ab initio* presumes that the appeal, if it had proceeded to conclusion, would have resulted in a reversal of the judgment with an instruction to the trial court to enter a judgment of acquittal. Merely allowing the conviction to stand, on the other hand, presumes that the appeal would have been unsuccessful.

Id. at *2. The New York Supreme Court, Kings County, stated the rationale for non-abatement as follows:

> The rationale of the cases that dismiss the appeal but do not vacate the judgment is that after conviction and before appeal the presumption of innocence ceases to exist, there is a presumption of regularity of the conviction, the State has an interest in maintaining a conviction presumed to be validly obtained and the victim of the crime has an interest in knowing that the perpetrator [***14] has been convicted. It is important to note that the United States Supreme Court has held that after conviction and before appeal the presumption of innocence ends. Indeed, the Supreme Court of the United States has stated that after trial and before appeal there is a presumption of guilt.

People v. Ekinici, supra at 658 (citations omitted).

While Korsen reasonably argues that this Court should apply the doctrine of abatement *ab initio* because it is the majority rule and appears to have been applied in *Stotter*, there is a strong public policy against the doctrine. HN5[↑] Abatement *ab initio* allows a defendant to stand as if he never had been indicted or convicted. U.S. v. Schumann, 861 F.2d 1234, 1237 (11th Cir. 1988). The State points out in its briefing that, while the defendant will never be able to appreciate the benefits of abatement, such a result "is particularly unfair to crime victims who have participated in often times painful trials only to see a hard won conviction overturned, not because of any error in the criminal proceedings, but simply as a matter of routine procedure based upon the arbitrary timing of the defendant's [***15] death."

When *Stotter* was decided in 1946, the abatement doctrine was appropriate since, at that time, there was generally no non-punitive effect of a criminal conviction and sentence. Clearly, a person could not be incarcerated after he died and a fine no longer served a punitive purpose. Therefore, there was no good reason for not abating the proceeding.

In recent years, HN6[↑] the state of Idaho has participated in the modern trend to require the guilty to bear the economic burden of their criminal activity. Numerous provisions enacted in recent years are designed to require convicted criminal defendants to shoulder the cost of criminal proceedings. Idaho Code § 19-854 authorizes courts to require reimbursement for public defender services. The Legislature has provided in chapter 32, title 31, Idaho Code, for the imposition of a variety of court costs and fees in criminal proceedings. Idaho Code §§ 19-5307 and 72-1025 provide for the imposition of fines for the benefit, respectively, of crime victims and of the state crime victims compensation account. Idaho Code § 20-225 provides for contribution toward [***16] the cost of probation or parole

supervision. It is not likely that the Legislature intended these or similar charges, at least to the extent accrued to the date of death, to abate upon the death of a convicted criminal defendant, whether or not an appeal was pending.

HN7[↑] Idaho has also provided substantial constitutional and statutory rights and protections for victims of crime. Idaho Code § 19-5306(1) mandates substantial rights for crime victims, including that they be "treated with fairness, respect, dignity and privacy throughout the criminal justice process." Idaho Code § 19-5304(2) provides:

> HN8[↑] Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order *a defendant found guilty* of any crime which results in an economic loss to the victim to make restitution to the victim. An order of restitution shall be a separate written order in addition to any other sentence the court may impose, including incarceration, and [**135] [*450] may be complete, partial, or nominal. The court may also include restitution as a term and condition of judgment of conviction; however, if a court orders restitution [***17] in the judgment of conviction and in a separate written order, a defendant shall not be required to make restitution in an amount beyond that authorized by this chapter. Restitution shall be ordered for any economic loss which the victim actually suffers. The existence of a policy of insurance covering the victim's loss shall not absolve the defendant of the obligation to pay restitution.

(Emphasis added). HN9[↑] Idaho Code § 19-5307 provides for payment of a fine upon conviction of certain offenses, to be paid over to the victim in addition to any restitution ordered. The people of Idaho subsequently enshrined these rights of crime victims in the Constitution of the State of Idaho at the general election on November 8, 1994. *See* Art. I, § 22, Idaho Constitution.

HN10[↑] With the enactment of I.C. § 19-5304(2), there is a strong public policy ground for not abating a criminal conviction. If the conviction is abated, it may abate the restitution order because, under the statute, a conviction or finding of guilt is necessary for an order of restitution. Further, abatement of the conviction would deny the victim of the fairness, respect [***18] and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide.

Thus, by virtue of the substantial changes brought about by the above-referenced provisions, particularly the victims' rights provisions, we hold that HN11[↑] a criminal conviction and any attendant order requiring payment of court costs and fees, restitution or other sums to the victim, or other similar charges, are not abated, but remain intact, in the event of the defendant's death following conviction and pending appeal. Such provisions are compensatory in nature and public policy does not favor their abatement. Provisions of the judgment of conviction pertaining to custody and incarceration are necessarily abated upon death without the necessity of a court order. Since we are not presented with the specific question addressed in *Stotter*, *i.e.* whether a fine imposed for punitive purposes is abated, we do not address it. To the extent that *Stotter* conflicts with our holding, it is overruled.

III.

CONCLUSION

Korsen's conviction and the order for payment of court costs and fees, including restitution, shall remain intact. The provisions of the judgment of conviction [***19] pertaining to custody or incarceration are abated. The appeal is dismissed.

Chief Justice SCHROEDER, Justices TROUT and EISMANN, and Justice CAREY Pro Tem, CONCUR.

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State v. Makaila

Supreme Court of Hawaii

June 14, 1995, Decided ; June 14, 1995, FILED

NO. 18553

Reporter
79 Haw. 40 *; 897 P.2d 967 **; 1995 Haw. LEXIS 48 ***

STATE OF HAWAI'I, Plaintiff-Appellee, v. GEORGE MAKAILA, Defendant-Appellant

Prior History: [***1] MOTION TO RECONSIDER ORDER DISMISSING APPEAL AND ORDER DENYING MOTION TO VACATE THE JUDGMENT OF CONVICTION AND TO ABATE THE PROSECUTION AB INITIO. CR. NO. 91-0389.

Counsel: Paul J. Cunney, for defendant-appellant George Makaila.

Alexa D. M. Fujise, Deputy Prosecuting Attorney for plaintiff-appellee State of Hawai'i.

Judges: Ronald T. Y. Moon, Robert G. Klein, Steven H. Levinson, Paula A. Nakayama, Mario R. Ramil

Opinion

[*41] [**968] *Per Curiam.* Counsel for the defendant-appellant George Makaila, deceased, moves this court for reconsideration of its April 10, 1995 order dismissing the appeal and denying his motion to vacate Makaila's judgment of conviction for murder.

For the following reasons, we grant the motion for reconsideration in part and vacate our order dismissing the appeal. Pursuant to *Hawaii Rules of Appellate Procedure (HRAP) Rule 43(a)* [1], this court will consider a motion for substitution of party and allow the appeal to proceed on the merits as provided herein.

[***2] *HN2*[↑] To the extent that *State v. Gomes, 57 Haw. 271, 554 P.2d 235 (1976)*, is inconsistent with this opinion, it is overruled.

I. *BACKGROUND*

Makaila was convicted of a single count of murder, in violation of *Hawaii Revised Statutes (HRS) § 707-701* (1985), and was sentenced to life imprisonment with the possibility of parole. Makaila timely filed a notice of appeal on November 16, 1994. On February 26, 1995, while the appeal was pending, Makaila died of cancer. On March 22, 1995, counsel for Makaila filed a one paragraph motion asking the court to vacate the judgment of conviction and abate the prosecution pursuant to *Gomes*. [2] Instead of vacating the judgment of conviction, we issued an order dismissing the appeal

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[1] *HRAP Rule 43(a)* provides:

> *HN1*[↑] **(a) Death of a Party.** If a party dies after notice of appeal is filed or while the proceeding is otherwise pending in a Hawaii [Hawai'i] appellate court, that court may substitute the personal representative of the deceased party as a party on motion filed by the representative or by any party with the clerk of the Supreme Court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as that court shall direct. If a party against whom an appeal may be taken dies after entry of judgment or order in the court or agency appealed from but before a notice of appeal is filed an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution shall be effected in the Hawaii [Hawai'i] appellate courts in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by [the party's] personal representative, or, if [the party] has no representative, by [the party's] attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the Hawaii [Hawai'i] appellate courts in accordance with this subdivision.

[2] In *State v. Gomes*, this court held that, upon the death of a criminal defendant pending appeal from a judgment of conviction, the judgment of conviction should be vacated and the criminal prosecution abated. *Gomes, 57 Haw. at 271, 554 P.2d at 236*.

pursuant to HRAP Rule 43(a).

[***3] On April 19, 1995, counsel for Makaila moved for reconsideration. Counsel asked this court to abide by its prior decision in *Gomes* and vacate the judgment of conviction. Counsel asserted that the family of George Makaila had an interest in seeing the conviction vacated and opined that this interest was protected by the due process clauses of the United States and Hawai'i Constitutions. In an appended affidavit, a Makaila family member stated that the family sought [*42] [**969] to have Makaila's name vindicated by appeal or by vacation of the conviction.

Recognizing that our order of dismissal was a departure from our earlier ruling in *Gomes*, we (1) directed the State to file a response to the motion to vacate judgment and (2) allowed counsel for Makaila to file a reply to the State's memorandum. In its response, the State acknowledged the *Gomes* rule, but queried whether this court should reevaluate the holding.

The issue for our consideration is whether a judgment of conviction following a trial on the merits in a criminal case must be vacated and the prosecution abated when a defendant dies pending his or her appeal.

II. *DISCUSSION*

The federal courts have consistently held [***4] that death pending appeal of a criminal conviction from the trial court abates not only the appeal, but also all proceedings in the prosecution from its inception. Annotation, *Abatement Effects of Accused's Death Before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. Fed. 446 (1986). Where a defendant dies pending appeal, the appeal is dismissed and the cause remanded to the trial court with instructions to vacate the judgment and dismiss the indictment. *See, e.g.*, United States v. Oberlin, 718 F.2d 894, 895 (9th Cir. 1983). Such abatement prevents recovery against the decedent's estate if there is a fine, and the abated conviction cannot be used in any related civil litigation against the estate. Oberlin, 718 F.2d at 895 (citations omitted). The rationale has been expressed as follows:

> When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."

[***5] United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (quoting Griffin v. Illinois, 351 U.S. 12, 18, 100 L. Ed. 891, 76 S. Ct. 585 (1956)). When, however, a criminal defendant dies pending a discretionary petition for writ of certiorari to the United States Supreme Court, the petition has been dismissed and the conviction stands. Dove v. United States, 423 U.S. 325, 46 L. Ed. 2d 531, 96 S. Ct. 579 (1976).

The majority of state jurisdictions also abate the prosecution *ab initio*. *See* Annotation, *Abatement of State Criminal Cases by Accused's Death Pending Appeal of Conviction – Modern Cases* 80 A.L.R. 4th 189 (1990). [3] [***6] As an alternative, a second group of states has allowed the appeal to be decided on the merits after the death of a criminal defendant. *See, e.g.*, State v. Jones, 220 Kan. 136, 137, 551 P.2d 801, 804 (1976); Gollott v. State, 646 So. 2d 1297 (Miss. 1994); State v. McGettrick, 31 Ohio St. 3d 138, 509 N.E.2d 378 (1987); Commonwealth v. Walker, 447 Pa. 146, 147-48, 288 A.2d 741, 742 (1972); State v. Christensen, 866 P.2d 533 (Utah 1993); [4] State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411 (1988).

[***7] [*43] [**970] For example, in *McGettrick*, the Ohio Supreme Court expressed dissatisfaction with both the majority rule and the alternative, *i.e.*, leaving the

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[3] In addition to Hawai'i, in *State v. Gomes*, the following states have issued opinions adhering to the majority rule: Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. 80 A.L.R. 4th at 192-194.

[4] In *State Christensen*, the Utah Supreme Court allowed an appeal to continue only where the sentence included a restitution order; the defendant had been convicted of failing to file a state tax return and pay state taxes, was sentenced to several prison terms, and was ordered to pay as restitution the amount of taxes owed. Following his death, the prosecution moved for the restitution order to continue after death. The court of appeals ruled that the judgment of conviction, including the restitution order, abated completely upon the defendant's death. On review, the Utah Supreme Court held that, where a criminal defendant died during the pendency of an appeal from a judgment that included payment of restitution, the court of appeals was required to hear the defendant's appeal on the merits insofar as it was related to the restitution order. If the appeals court affirmed the trial court, the judgment for restitution would remain valid and enforceable. If there was a reversal or a remand, the defendant could not be retried and the judgment would abate. Christensen, 866 P.2d at 537.

conviction in place while dismissing the appeal. The court explained its dilemma as follows:

> To hold as the appellant seeks us to hold would effectively preclude a convicted criminal defendant from exercising his constitutional right to a direct review of his criminal conviction. [5] [***9] This would be so even if there was a major prejudicial error committed before or during trial, or, not inconceivable, it was later shown that the deceased had not committed the crime for which he had been convicted. Such a holding would be violative of the convicted defendant's fundamental rights, even though he be deceased.
>
> Alternately, the defendant-appellee's counsel would have us hold that the death of the defendant during the pendency of his appeal renders the appeal moot and since such defendant would not have had his full right of review, the appeal should be dismissed, the original judgment of conviction vacated and the original indictment dismissed. To accept appellee's position would require us to ignore the fact that the defendant has been [***8] convicted and, therefore, no longer stands cloaked with the presumption of innocence during the appellate process. Such a holding would not be fair to the people of this state who have an interest in and a right to have a conviction, once entered, preserved absent substantial error.

McGettrick, 31 Ohio St. 3d at 140-41, 509 N.E.2d at 380. Consequently, the court declined either alternative offered by the parties and allowed, by motion, for the substitution of another person for the deceased criminal defendant, in accordance with an appellate rule similar to our own. *McGettrick, 31 Ohio St. 3d at 141-43, 509 N.E.2d at 381-82*. [6] If no personal representative were appointed within a reasonable period of time, the State could suggest the death on the record, and the appellate court could substitute any proper party, including the decedent's attorney of record, as a party-defendant and proceed with the appeal. *Id.* If no substitution were sought, the *McGettrick* court indicated that the court of appeals could dismiss the appeal as moot and vacate the original conviction and all related criminal proceedings. *Id.*

In reaching what it regarded as the best solution, the *McGettrick* court noted that it was in the interests of the defendant, the defendant's estate, and society that any challenge initiated by a defendant to the regularity of a criminal proceedings be fully reviewed and decided by the appellate process. *See also Jones, 551 P.2d at 801* (the interests of the family of the defendant and the public in the final determination of a criminal case, as well as the fact that collateral [***10] rights might be affected by the criminal proceeding, warranted the conclusion that the appeal should be adjudicated on its merits despite the defendant's death); *Walker, 288 A.2d at 743* (the Pennsylvania Supreme Court, rejecting a motion by the defense for abatement *ab initio* and a motion by the prosecution to dismiss, concluded that it was in the interests of both the defendant's estate and society that any challenge initiated to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process).

Similarly, in *McDonald*, the Wisconsin Supreme Court recognized that a criminal defendant's right to a direct appeal is an integral part of a final determination of the merits of the case and serves as a safeguard to protect defendants against errors in criminal proceedings. Moreover, because collateral [*44] [**971] proceedings could be affected by the outcome of a criminal case, the *McDonald* court ruled that it was in the interest of society to have a complete review of the merits of the criminal proceeding. Having determined that society and the deceased's estate both have real interests in a final determination of the defendant's appeal, [***11] the court held that the criminal appeal should continue. *McDonald, 144 Wis. 2d at 539, 424 N.W.2d at 415*. [7]

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[5] *HN3*[↑] A criminal defendant in Hawai'i does not have a constitutional right to a direct appeal, but there is such a statutory right. *Briones v. State, 74 Haw. 442, 460 848 P.2d 966, 975 (1993)*.

[6] *HN4*[↑] Ohio Appellate Rule 29(A) is similar to *HRAP Rule 43(a)* and provides in relevant part:

> If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party or motion filed by the representative or by any party, with the clerk of the court of appeals . . . if the deceased party has no representative, any party may suggest the death on the record and proceedings shall be had as the court of appeals may direct . . . .

McGettrick, 31 Ohio St. at 141-42, 509 N.E.2d at 381.

[7] In issuing its opinion, the Wisconsin Supreme Court overruled *State v. Krysheski, 119 Wis. 2d 84, 349 N.W.2d 729 (Wis. Ct. App. 1984)*, which held that the death of a criminal

In *Gollott,* the Mississippi Supreme Court overruled previous decisions that required the dismissal of an appeal while letting the criminal conviction stand when a criminal defendant died pending appeal. To explain its change of view, the court stated:

> We are no longer of the opinion that the abatement *ab initio* rule obviously results in a "miscarriage of justice." There are essentially three reasons for penal statutes in our justice System: (1) to protect society from dangerous individuals; (2) to hopefully rehabilitate convicted criminals; and (3) to deter others from violating the law. Following the abatement *ab initio* rule does not undermine [***12] any of these purposes. What is obvious is that society needs no protection from the deceased, nor can the deceased be rehabilitated. Moreover, other potential criminals will be no less deterred from committing crimes. In the abatement *ab initio* scheme, the judgment is vacated and the indictment is dismissed, but only because the convicted defendant died. Surely this would not give peace of mind to the criminally inclined.

Gollott, 646 So. 2d at 1300. The *Gollott* court, however, refused to adopt the majority rule completely, but instead followed the rationale of *McGettrick,* which allowed for the substitution of any person for a deceased criminal defendant pursuant to Mississippi Supreme Court Rule 43(a). If no substitution were requested, the *Gollott* court determined that the majority rule in effect in the federal courts and most state courts, *i.e.,* abatement *ab initio,* was the most appropriate course of action. *Gollott, 646 So. 2d at 1304.* [8]

[***13] A third group of jurisdictions simply dismisses the pending criminal appeal outright and permits the conviction to stand. *See, e.g., Whitehouse v. State, 266 Ind. 527, 364 N.E.2d 1015 (1977); Royce v. Commonwealth, 577 S.W.2d 615 (Ky. 1979)* (despite the adherence to the majority view by a court of appeals opinion, the Kentucky Supreme Court disapproved the opinion and dismissed an appeal *sua sponte* after defense counsel moved for vacation of the entire criminal proceeding upon the defendant's death); *Commonwealth v. De La Zerda, 416 Mass. 247, 619 N.E.2d 617 (1993)* (holding that Massachusetts follows the majority rule with respect to direct appeals; however, where a conviction has been confirmed on direct appeal and there is a subsequent collateral attack on the conviction, the appeal stemming from the collateral attack is dismissed when the defendant dies pending the appeal); *State v. Anderson, 281 S.C. 198, 314 S.E.2d 597 (1984); Vargas v. State, 659 S.W.2d 422, 423 (Tex. Crim. App. 1983).* [9]

[***14] For example, in *Whitehouse,* the defendant, convicted of murder in the first degree and sentenced to life imprisonment, died while his appeal was pending. Defense counsel moved for remand to the trial court with instructions to dismiss the appeal pursuant to the established rule in the federal courts. Counsel further argued that the defendant had a constitutional and statutory right to appeal and that all proceedings should be dismissed because his appeal rights had been frustrated.

Rejecting counsel's argument, the Indiana Supreme Court dismissed the appeal, and explained that:

> [*45]
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> [**972] We do not see that the dismissal of the appeal, without more, denies any rights granted or protected by the statutes or the constitutional provisions. Such rights were personal to and exclusively those of the defendant. Although a criminal conviction carries a definite "fall-out" that extends beyond the person of the defendant, we are aware of no right to be free of such, even if such conviction be erroneous. I may no more appeal my brother's conviction than I may enter his guilty plea.
>
> The determination of a disposition to be made of proceedings cast in limbo by the death of the defendant-appellant [***15] appears to us [] to be one of policy only.
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> . . . .
>
> . . . The presumption of innocence falls with a guilty verdict. At that point in time, although preserving all of the rights of the defendant to an appellate review[] for good and sufficient reasons, we

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defendant pending direct appeal abates all prior proceedings.

[8] One state, Oregon, has rejected the practice of substituting parties in criminal appeals. Pursuant to an appellate rule, ORAP 12.11, on abatement of an appeal from a conviction of a crime because of the death of the defendant, the prosecution is required to move for an order of dismissal. *State v. Kaiser, 297 Ore. 399, 683 P.2d 1004 (1984).*

[9] The State cites a Mississippi decision, ***Haines v. State, 428 So. 2d 590 (Miss. 1983),*** as following this minority view. *Haines,* however, was overruled by *Gollott, 646 So. 2d at 1300.*

> presume the judgment to be valid, until the contrary is shown. To wipe out such a judgment, for any reason other than a showing of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results in the area of survivor's rights in more instances than it would avert injustice. It therefore [] is our opinion that it would be unwise for us to reach out to adopt a policy favoring survivor rights of questionable validity. In arriving at this decision, we do not cut off any rights that survivors may now or hereafter have. Whether or not the bona fides of a conviction may yet be tested by survivors in cases where the appeals were aborted by death is a question best left for litigation confined within the parameters of the interests claimed.

Whitehouse, 266 Ind. at 529-30, 364 N.E.2d at 1016.

Although we recognize that the ruling espoused in *Gomes* remains the majority view, [***16] we have reservations concerning the continued application of *Gomes* without modification. Upon the death of a criminal defendant pending appeal, it seems unreasonable automatically to follow the abatement *ab initio* rule and pretend that the defendant was never indicted, tried, and found guilty. Similarly, outright dismissal of the appeal -- without the possibility of a review of the merits -- seems equally unacceptable. Further, we recognize the importance of the interests advanced by both parties in the matter before us, although neither set of interests is of constitutional proportions. Makaila's family seeks "vindication" of the deceased. The State has an interest in preserving the presumptively valid judgment of the trial court. A resolution of the matter of going forward with the appeal in the circumstances before us involves a policy decision that rests solely within the discretion of this court pursuant to *HRAP Rule 43(a)*. Thus, *HN5*[↑] we conclude that the rule and rationale enunciated by the Ohio Supreme Court in *McGettrick* fashions a fair compromise between the competing interests.

HN6[↑] By its plain language, *HRAP Rule 43(a)* [10] allows for the substitution of a party for a [***17] deceased criminal defendant. We therefore hold, as did the *McGettrick* court, that the appellate substitution rule permits a defendant's personal representative or the State to file a motion for substitution within a reasonable time after death. The appellate court may, in its discretion, allow for substitution of a proper party-defendant. Absent such a motion, the appellate court may, in its discretion, either (1) dismiss the appeal as moot, vacate the original judgment of conviction, and dismiss all related criminal proceedings, or, in the alternative, (2) enter such other order as the appellate court deems appropriate pursuant to *HRAP Rule 43(a)*. Our holding applies only to direct appeals as of right. [11] When a criminal defendant dies pending a discretionary petition to this court, the petition will be dismissed as moot, and the conviction will stand. *See Dove v. United States, supra.*

[***18] [*46] [**973] III. *CONCLUSION*

Based upon the foregoing, we vacate the order of dismissal and reinstate Makaila's appeal, subject to the proviso that within thirty days either party may move, pursuant to *HRAP 43(a)*, for substitution of a proper party-defendant. If a motion for substitution is not filed within thirty days after entry of this opinion, further proceedings shall be had as this court may direct in accordance with *HRAP Rule 43(a)*.

Ronald T. Y. Moon

Robert G. Klein

Steven H. Levinson

Paula A. Nakayama

Mario R. Ramil

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[10] *See supra* note 1.

[11] Where a conviction is affirmed on direct appeal and there is a subsequent collateral attack on the conviction, the appeal stemming from the collateral attack should be dismissed if the defendant dies pending appeal from the collateral judgment.

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People v. Peters

Supreme Court of Michigan

May 3, 1995, Argued ; August 10, 1995, Decided ; August 10, 1995, FILED

No. 99830

Reporter
449 Mich. 515 *; 537 N.W.2d 160 **; 1995 Mich. LEXIS 1475 ***

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v LOUIS PETERS, Defendant-Appellee.

Prior History: [***1] *205 Mich. App. 312; 517 N.W.2d 773 (1994)*.

Disposition: Reversed and remanded.

Counsel: Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, John D. O'Hair, Prosecuting Attorney, Timothy A. Baughman, Chief, Research, Training, and Appeals, and Janet A. Napp, Assistant Prosecuting Attorney [Detroit, MI], for the people.

Elizabeth L. Jacobs [Detroit, MI] for defendant.

Judges: BEFORE THE ENTIRE COURT. Chief Justice James H. Brickley, Justices Charles L. Levin, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Conrad L. Mallett, Jr., Elizabeth A. Weaver. CAVANAGH, J. (dissenting).

Opinion by: Elizabeth A. Weaver

Opinion

[*516] [**161] Opinion

WEAVER, J.

We granted leave to consider whether an order of restitution should abate where a convicted criminal defendant died pending [*517] appeal of his conviction. [1] To decide this issue it is necessary to clarify our position on the rule of abatement ab initio.

In *People* v *Elaulm*, we applied the rule of abatement ab initio to dismiss an [***2] appeal from a criminal conviction and erase the criminal conviction and accompanying penal sanctions where a defendant died pending appeal. [2] We continue to believe that it is appropriate to dismiss an appeal upon the death of a convicted criminal defendant, but are not persuaded that abatement ab initio, when applied to compensatory sanctions, is consistent with Michigan law since the 1985 enactment of the Michigan Crime Victim's Rights Act, *MCL 780.751 et seq.*; MSA 28.1287(751) *et seq.*, and the 1988 amendment of *art 1, § 24 of the Michigan Constitution*. Instead, we hold that ***HN1***[↑] where a convicted defendant dies pending appeal, the appeal should be dismissed, absent collateral consequences not presented here, and the underlying conviction and accompanying compensatory sentencing sanctions should stand. Purely penal sanctions, however, should be abated ab initio because they no longer continue to serve a purpose.

I

On September 20, 1990, defendant Louis Peters entered [***3] a plea of no contest to four counts of burning dwelling houses, *MCL 750.72*; MSA 28.267; two counts of burning real property, *MCL 750.73*; MSA 28.268; four counts of burning insured property, *MCL 750.75*; MSA 28.270; and one count of conspiracy to burn insured property, *MCL 750.157a*; [**162] MSA 28.354(1) and *MCL 750.75*; MSA 28.270. At sentencing, defendant was ordered to [*518] serve three years' probation, to pay a criminal fine of $ 10,000, and to pay $ 400,000 in restitution. [3] The restitution was to be divided between the victims, the City of Detroit ($ 140,000) and Michigan Basic Property Insurance

[1] *448 Mich. 851 (1995)*.

[2] *393 Mich. 601; 227 N.W.2d 553 (1975)*.

[3] Defendant was also ordered confined to his home for the first year of probation, to pay for the associated costs of that confinement, and not to practice real estate during his probation.

Association ($ 260,000). [4] Because defendant was suffering from terminal lung cancer, he was not ordered to serve time in jail.

[***4] Defendant appealed the amount of the restitution order. [5] However, during the pendency of his appeal, defendant died. On notification of defendant's death, the Court of Appeals remanded the case for entry of an order dismissing the case ab initio. [6] The Court of Appeals denied the prosecutor's motion for rehearing, and we denied the prosecution's leave to appeal the denial of rehearing at that time. [7] [***5] On remand, the trial court abated the criminal conviction and $ 10,000 fine, but held that the $ 400,000 order of restitution survived the abatement ab initio of the criminal case. The trial court relied on *HN2*[↑] art 1, § 24 of the Michigan Constitution, which guarantees a crime victim's right to restitution, and the reasoning of People v Dudley, 739 F.2d 175 (CA 4, 1984). [8]

Defendant, by his attorney, appealed the trial [*519] court's ruling regarding the order of restitution. The Court of Appeals reversed, holding that *HN3*[↑] an order of restitution must be vacated when a defendant's criminal conviction is abated ab initio because of defendant's death. [9] The prosecution appealed the abatement of the order of restitution. [10] We reverse and reinstate the order of restitution.

II

HN4[↑] There is no federal constitutional right to an appeal. [11] However, the perception of appeal as the opportunity to finally determine a convicted defendant's [***6] guilt or innocence is one source of the rule of abatement ab initio. Despite this perception, it is well established in the federal system that, once convicted, a criminal defendant is no longer presumed innocent. [12] Art 1, § 20 of the Michigan Constitution does provide for an appeal of right from a criminal conviction. Even given this appeal of right, a criminal conviction in Michigan also destroys the presumption of innocence. [13] A convicted criminal defendant must prove error requiring reversal. [14] [***7] It is also interesting to note that the appeal of right has recently been limited. [15] Although the recent constitutional [**163] amendment does [*520] not apply in this case, we find that the appeal of right was personal to the defendant and, therefore, died with him. [16]

In literal application, abatement ab initio erases a criminal conviction from the beginning on the theory that all injuries resulting from the crime "are buried with the offender." [17] The reasoning behind abatement ab initio

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[4] The City of Detroit estimated that it had expended approximately $ 179,106.24 fighting the fires that were the subject of defendant's convictions. Michigan Basic testified that of ninety homes owned by defendant that had burned, twenty-five were listed as resulting from arson. Michigan Basic had paid $ 277,000 in proceeds for those twenty-five homes.

[5] Defendant also alleged that the plea was improperly induced and involuntary, that defendant was not informed of the consequences of his plea, and that he was denied effective assistance of counsel.

[6] Unpublished order, entered July 16, 1991 (Docket No. 136343).

[7] *439 Mich. 893 (1991)*. Justices Brickley, Boyle, and Riley would have granted leave.

[8] The United States Court of Appeals for the Fourth Circuit held that the death of a defendant pending appeal required that the purely penal sanctions abate, but an order of restitution survived.

[9] 205 Mich. App. 312; 517 N.W.2d 773 (1994).

[10] We denied defendant's cross appeal regarding the voluntariness of his plea by order dated January 4, 1995. 448 Mich. 851.

[11] Ross v Moffitt, 417 U.S. 600, 611; 94 S. Ct. 2437; 41 L. Ed. 2d 341 (1974).

[12] Herrera v Collins, 506 U.S. ; 113 S. Ct. 853; 122 L. Ed. 2d 203 (1993).

[13] People v Rowell, 14 Mich. App. 190; 165 N.W.2d 423 (1968); People v Tate, 134 Mich. App. 682; 325 N.W.2d 297 (1984).

[14] Rowell, n 13 supra.

[15] The appeal of right no longer applies to guilty pleas and pleas of nolo contendere. Const 1963, art 1, § 20 as amended December 24, 1994. On April 1, 1995, this Court amended Michigan Court Rule 7.203 to exclude convictions in criminal cases based on a guilty plea or a plea of nolo contendere from appeals of right.

[16] Other jurisdictions allow a substitute to pursue the defendant's appeal. See, e.g., *State* v *Makalia*, 1995 West Law 355150 (Hawaii) (June 14, 1995). However, we see no reason to allow a substitute to pursue the appeal or to upset a presumptively valid conviction.

[17] United States v Oberlin, 718 F.2d 894, 896 (CA 9, 1983),

varies among jurisdictions ascribing to the rule. [18] Some jurisdictions distinguish between appeals of right and discretionary review when applying the rule. Those jurisdictions that have rejected the rule of abatement ab initio may dismiss the appeal, [19] abate the appeal, [***8] [20] allow the appeal to proceed notwithstanding the defendant's death, [21] or substitute a personal representative for the defendant. [22]

[***9] This Court's treatment of appeals from criminal convictions on the defendant's death has varied. In *People v Elauim, 393 Mich. 601; 227 N.W.2d 553 (1975)*, this Court abated ab initio the indictment of a defendant who died pending his appeal from a conviction for first-degree murder. The *Elauim* Court relied on the reasoning of the United States Supreme Court in *Durham v United States, 401 U.S. 481; [*521] 91 S. Ct. 858; 28 L. Ed. 2d 200 (1971)*. In *Durham*, a criminal defendant's indictment was abated following his death. [23] [***10] However, in other cases this Court has dismissed appeals from criminal convictions that were interrupted by the death of the defendant, apparently allowing the convictions to remain intact. [24]

We take this opportunity to clarify our position on abatement ab initio. Where a defendant dies pending an appeal of a criminal conviction, we hold that the appeal should be dismissed, but the conviction retained. The conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right. We therefore find that it is inappropriate to abate a criminal conviction.

Further, it is better policy to allow the litigation to end and the presumptively valid conviction to stand than it is to allow the convicted defendant's survivors to pursue litigation ad infinitum, in an effort to clear the [**164] deceased defendant's name. We [*522] agree with the rationale offered by the Indiana Supreme Court:

> The presumption of innocence falls with a guilty [***11] verdict. At that point in time, although preserving all of the rights of the defendant to an appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown. To wipe out such a judgment, for any reason other than a showing of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results in the area of survivor's rights in more instances that it would avert an injustice. [25]

Finally, we see no state interest, under the facts presented in this case, that can be served by allowing an appeal to proceed when the defendant is not

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quoting *United States v Dunne, 173 F 254, 258 (CA 9, 1908)*.

[18] See, e.g., *Hartwell v Alaska, 423 P.2d 282 (Alas, 1967)* (abatement from the beginning because the presumption of innocence stands until the conclusion of an appeal); *Arizona v Griffin, 121 Ariz 538; 592 P.2d 372 (1979)* (conviction abates from the beginning because society's interest in protection has been satisfied and punishment is impossible); *Maine v Carter, 299 A.2d 891 (Me, 1973)* (conviction abates because it is moot and for the lack of an indispensable party).

[19] *Whitehouse v Indiana, 266 Ind 527; 364 N.E.2d 1015 (1977)*.

[20] *Vargas v Texas, 659 S.W.2d 422 (Tex Crim App, 1983)*.

[21] *Wisconsin v McDonald, 144 Wis 2d 531; 424 N.W.2d 411 (1988)*.

[22] *Ohio v McGettrick, 31 Ohio St 3d 138; 509 N.E.2d 378 (1987)*.

[23] The United States Supreme Court at least partially overruled *Durham* five years later when it dismissed a defendant's petition for certiorari upon his death in *Dove v United States, 423 U.S. 325; 96 S. Ct. 579; 46 L. Ed. 2d 531 (1976)*. The majority of federal courts has interpreted *Dove* as overruling *Durham* only to the extent that *Durham* would abate ab initio convictions where the defendant had no appeal of right. We are not bound by these decisions because no federal constitutional right is implicated.

Further, the *Durham* Court appeared to dismiss the distinction between appeals of right and discretionary appeals: "Since death will prevent any review on the merits, whether the situation is an appeal [of right] or certiorari [i.e., a discretionary appeal], the distinction between the two would not seem to be important for present purposes." *401 U.S. 483*, n *. See also *United States v Dwyer, 855 F.2d 144, 145-146 (CA 3, 1988)* (Sloviter, J., concurring); *State v McDonald, 138 Wis 2d 366, 370; 405 N.W.2d 771 (Ct App, 1987)* (Sundby, J., concurring) (affirmed in part and reversed in part) *144 Wis 2d 531; 424 N.W.2d 411 (1988)*.

[24] *People* v *Gratopp*, unpublished order of the Supreme Court, entered January 28, 1991 (Docket No. 90262); *People* v *Weston*, unpublished order of the Supreme Court, entered June 8, 1989 (Docket No. 73131); ***People v McCree, 383 Mich. 755 (1969)***; ***People v Lester Smith, 383 Mich. 753 (1969)***.

[25] See, e.g., *Whitehouse v Indiana, n 19 supra at 529-530*.

available for trial. [26]

III

Given our decision to dismiss an appeal and retain the conviction where a criminal defendant dies with an appeal pending, we now consider the status of fines, penalties, and orders that may accompany a criminal conviction. [***12] The majority of jurisdictions that have addressed this issue have found that the resolution turns on the purpose the fine, penalty, or order is to serve. Typically, jurisdictions have identified two purposes for the sanctions associated with a criminal conviction: penal and compensatory. [27] The majority of jurisdictions abate or dismiss sanctions that are primarily penal. [28] [*523] However, where the intent behind a fine or order is to compensate the victim, the fine or order may survive the death of the offender. [29] Although the distinction between penal and compensatory is helpful, it is not always clear. Indeed, with almost any sanction, it is possible to identify both penal and compensatory purposes.

In this case, we address whether an order of restitution should abate on the death [***13] of defendant. Although defendant argued that the order was a penalty because it would force him to pay a large sum of money, the order was designed to compensate the City of Detroit Fire Department and Michigan Basic for their combined costs of approximately $ 456,000. Pursuant to stipulation by the parties, a substantial portion of those costs were to be recouped by the victims through restitution. However, the fact that defendant, now his estate, will experience some "financial pain" does not transform the restitution order into a primarily penal sanction. Erasing the order of restitution or even attempting to divine the portion of the order that the trial judge acknowledged he hoped would cause some "financial pain" is inconsistent with the Michigan Constitution and the Michigan Crime Victim's Rights Act. These laws authorized the payment of restitution, because the victims had suffered significant losses as a result of defendant's criminal conduct.

The Michigan Crime Victim's Rights Act was enacted in 1985 in response to growing recognition of the concerns of crime victims. The act codifies a crime victim's right to restitution, while leaving to the discretion of the sentencing [***14] judge the form the restitution will take:

> [*524] *HN5*[↑] The court, when sentencing a defendant convicted of a crime, shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full or partial restitution to any victim of the defendant's course of conduct that gives rise to the conviction, or to the victim's estate. [30]

In 1988, after the enactment of the Crime Victim's Rights Act, Michigan's Constitution [**165] was amended to further enumerate the rights of crime victims. [31] These laws underscore the rights of crime victims and the compensatory nature of restitution in Michigan.

[***15] At sentencing in this case, the Wayne County Prosecutor's office, on behalf of the Detroit Fire Department, and Michigan Basic, on its own behalf, presented evidence of defendant's financial victimization of them. The prosecutor requested $ 179,106.24 to

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[26] ***Haines v State, 428 So. 2d 590 (Miss, 1983).***

[27] See, e.g., *United States v Dudley, supra*; *United States v Asset, 990 F.2d 208 (CA 5, 1993)*; *United States v Cloud, 872 F.2d 846 (CA 9, 1989)*.

[28] *Id.*

[29] *United States v Dudley, supra.*

[30] *MCL 780.766(2)*; MSA 28.1287(766)(2).

[31] *HN6*[↑] Art 1, § 24(1) states:

> Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
>
> The right to timely disposition of the case following arrest of the accused.
>
> The right to be reasonably protected from the accused throughout the criminal justice process.
>
> The right to notification of court proceedings.
>
> The right to attend trial and all other court proceedings the accused has the right to attend.
>
> The right to confer with the prosecution.
>
> The right to make a statement to the court at sentencing.
>
> The right to restitution.
>
> The right to information about the conviction, sentence, imprisonment, and release of the accused.

cover the costs incurred by the Detroit Fire Department in extinguishing the fires that were the subject of the defendant's no contest [*525] plea. Michigan Basic reviewed a decade of records involving claims in which defendant was a named insured and discovered that it had paid defendant approximately $ 800,000 as a result of ninety fires. In twenty-five of those fires, involving payments of approximately $ 277,000, arson was suspected. [32] After some discussion off the record, the parties orally stipulated to and the trial court adopted a $ 400,000 restitution figure. [33]

[***16] On the basis of some language employed by the trial judge, [34] counsel for defendant argued on appeal that the restitution order was primarily penal. The Court of Appeals apparently agreed. We find that the Court of Appeals and defense counsel's [*526] narrow focus on a few comments made by the trial judge fails to account for the totality of the trial judge's considerations at sentencing. There is no doubt that an order of restitution would cause this defendant financial pain, but financial pain does not automatically render the order primarily penal.

[***17] The order of restitution was issued under the authority of the Michigan Constitution and the Crime Victim's Rights Act. Art 1, § 24 and the Crime Victim's Rights Act were intended to enable victims to be compensated fairly for their suffering at the hands of convicted offenders. It is clear that the Court of Appeals did not recognize that the trial court intended that the order of restitution defray the financial loss suffered by the victims, Michigan Basic, and the Detroit Fire Department. Once the amount of restitution was decided, the trial judge emphasized that the proration of the restitution [**166] between the victims was a matter for them to decide and not a concern for the court or defendant.

Counsel for defendant cross appealed the voluntariness of the plea, arguing that it would be improper to allow a challenged order of restitution to stand. The Court of Appeals did not address the voluntariness of the plea, and we denied leave to appeal that issue. However, the logic that supports dismissing the appeal also supports enforcing the order of restitution.

We reverse the decision of the Court of Appeals and remand the case to the trial court for an order consistent with this opinion.

[***18] Elizabeth A. Weaver

James H. Brickley

Patricia J. Boyle

Dorothy Comstock Riley

Conrad L. Mallett, Jr.

Dissent by: Michael F. Cavanagh

Dissent

CAVANAGH, J. *(dissenting).*

I respectfully dissent. I would [*527] uphold the rule of abatement ab initio, and apply it to abate the entire criminal cause (i.e., the conviction and any collateral consequences of the conviction) in cases in which the defendant dies pending resolution of his appeal. In other words, I would uphold our prior decision in *People v Elauim, 393 Mich. 601; 227 N.W.2d 553 (1975)*.

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[32] It showed restraint on the part of the trial judge to limit consideration of Michigan Basic's injuries to the twenty-five suspicious fires, given defendant's course of conduct.

[33] The parties' agreement included Michigan Basic's promise not to pursue federal RICO charges against defendant.

[34] As the parties prepared to negotiate a stipulated amount of restitution, the trial judge stated:

> Here's what I want . . . . I'm not telling you that I've already drawn a bottom line in terms of sentence, but we know as an absolute fact that Mr. Peters has cancer. He's 67 years old, and he has lung cancer, and, quite frankly, the doctor says that not only would his sentence to prison be detrimental but that, unfortunately, only ten to 15 percent of the patients remain alive for three years. . . .
>
> If any--even with that knowledge, do not think for a second that I'm not absolutely ripped up over the thought that someone who would be the instigator and cause of this kind of conduct shouldn't, even with the lung cancer, go to prison. Don't think for a moment that it isn't still in my mind, and I am really torn up about what to do here.
>
> That said, if there were sufficient--and I don't like--pain, real pain, and part of that, I think, would be, in this case, financial pain, that's part of a--of a consideration . . . and identify assets to me that I can tie up, literally, so that I don't have to worry, and I mean like bank accounts. I mean real assets.
>
> I don't want garbage, and as long as I'm satisfied that I know where those are and I can tie them up, I'm willing to talk, but I want pain, financial pain out of this. At least, maybe that will balance this equation out a little bit.

However, I would take this opportunity to confine *Elaum's* application to cases in which the defendant dies pending his *appeal of right.* In cases in which the defendant dies pending a *discretionary appeal,* I would hold that such an appeal should be dismissed as moot, and that the conviction and collateral consequences of the conviction should stand. [1]

[***19] When a defendant dies while his appeal of right is pending, I believe that the defendant's *appeal* and *conviction* should be abated for the reason endorsed by some federal courts, and by the instant Court of Appeals panel:

> The Supreme Court may dismiss the petition without prejudicing the rights of the deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, "when an appeal has been taken from a criminal conviction to the court of appeals and death has *deprived the accused of his right to [an appellate] decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of* [*528] *his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."* Griffin v Illinois, 351 U.S. 12, 18; 76 S. Ct. 585, 590; 100 L Ed 891 (1956). [United States v Moehlenkamp, 557 F.2d 126, 128 (CA 7, 1977)] (emphasis added). See also United States v Asset, 990 F.2d 208, 210-211 (CA 5, 1993); United States v Oberlin, 718 F.2d 894 (CA 9, 1983); United States v Pauline, 625 F.2d 684, 685 (CA [***20] 5, 1980); 205 Mich. App. 312, 317; 517 N.W.2d 773 (1994).]

When a defendant dies while his appeal of right is pending, I believe that any *further sanctions or orders arising from the defendant's conviction* should be abated for the following reasons stated by the instant Court of Appeals panel:

> In contrast to the holding in *Dudley,* we hold that a restitution order is dismissed when it is based on a criminal conviction that is abated ab initio. We arrive at this conclusion by considering the rationale behind the principle of abatement, which provides that a defendant should not stand convicted when death deprives the defendant of the right to an appellate decision. [United States v Asset, supra at 210-211.] This rationale is based on the premise that the resolution of an appeal can reverse a conviction. It is obvious that an appellate decision can also reverse those orders arising [**167] from a conviction such as a restitution order. Furthermore, the importance of an appellate decision is apparent in the Michigan Constitution, which declares that criminal defendants have a right to appeal. Const 1963, art 1, § 20. With this in mind, we believe that the principle of abatement [***21] extends to a restitution order where a defendant's death prevents an appeal of the defendant's conviction.
>
> * * *
>
> In order to abide by defendant's right to appeal, we dismiss the restitution order because appellate review is not possible. Although the victim has a right to restitution, this right does not entitle the [*529] victim to restitution imposed by an order that is not subject to appellate review.
>
> In addition, we disagree with the analysis in *Dudley* that a restitution order survives abatement ab initio of the underlying conviction on the ground that the primary purpose of restitution is to compensate the victim. Restitution under MCL 780.766(2); MSA 28.1287(766)(2) is part of the court's sentence, see [*People* v] *Schluter* [204 Mich. App. 60; 514 N.W.2d 489 (1994)], and is dependent upon the existence of a conviction. If the conviction is void, then the restitution order also becomes void because a victim's right to restitution remains dependent on a conviction. Thus, we are not convinced that a restitution order's compensatory purpose determines whether the order survives abatement ab initio of the underlying conviction. [205 Mich. App. 319-320.]

Obviously, [***22] I have a fundamental difference of opinion with the majority concerning the significance of a convicted defendant's constitutional right to an appeal. I cannot accept the majority's position that considerations of judicial economy are more important than assuring a proper appellate resolution of the guilt

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[1] The majority of federal courts likewise distinguish between appeals of right and discretionary appeals, and apply the abatement ab initio rule to abate at least the appeal and conviction when the defendant dies pending an appeal of right. See United States v Davis, 953 F.2d 1482 (CA 10, 1992); Clarke v United States, 286 U.S. App DC 256; 915 F.2d 699 (1990); United States v Williams, 874 F.2d 968 (CA 5, 1989); United States v Schumann, 861 F.2d 1234 (CA 11, 1988); United States v Mollica, 849 F.2d 723 (CA 2, 1988); United States v Wilcox, 783 F.2d 44 (CA 6, 1986); United States v Littlefield, 594 F.2d 682 (CA 8, 1979); United States v Bechtel, 547 F.2d 1379 (CA 9, 1977).

or innocence of a convicted defendant. ("It is better policy to allow the litigation to end and the presumptively valid conviction to stand than it is to allow the convicted defendant's survivors to pursue litigation ad infinitum, in an effort to clear the deceased defendant's name." Slip op at 8.) In my view, the interest of justice requires deference to a criminal defendant's constitutional right to an appeal when the defendant dies during the pendency of an appeal of right. While I am aware that a victim has a constitutional right to restitution and that a convicted defendant is no longer presumed innocent, I also believe that when the issues are compensation stemming from a conviction versus a final adjudication of a defendant's guilt or innocence, notions [*530] of fundamental fairness demand giving priority to the latter guarantee.[2]

[***23] Because the defendant in this case died during the pendency of his appeal of right, I would abate the entire criminal cause–including the restitution order stemming from the conviction. The decision of the Court of Appeals should be affirmed.

Michael F. Cavanagh

Charles L. Levin

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[2]The majority misreads the Court of Appeals analysis of the compensatory component to the restitution order. The majority indicates that the reason that the Court of Appeals abated the restitution order in this case was because the Court considered the order to be "primarily penal." Slip op at 13.

The Court of Appeals explicitly acknowledged both the compensatory and penal qualities of a restitution order. ("This Court has recognized that the purpose of restitution is to compensate the injured party. . . . In addition, a restitution order authorized under statute has punitive aspects." 205 Mich. App. 319.) However, the Court of Appeals did not find it necessary to determine which qualities predominated in the instant order because the Court's analysis of the abatement rule's application to the order did not turn upon the purpose of the order. Instead, the Court emphasized the relationship between the conviction and the restitution order. Recognizing that the conviction had to be abated under its understanding of the abatement doctrine, and further recognizing that the restitution order in this case was based on that conviction, the Court concluded that the restitution order likewise had to be abated. See, i.e., "If the conviction is void, then the restitution order also becomes void because a victim's right to restitution remains dependent on a conviction." *205 Mich. App. 320*. Thus, contrary to the majority's suggestion, whether the restitution served a compensatory or penal purpose was not the dispositive factor under the Court of Appeals analysis.

⚠ Caution
As of: February 8, 2018 9:05 PM Z

State v. McDonald

Supreme Court of Wisconsin

February 3, 1988, Argued ; June 16, 1988, Decided

No. 86-0942-CR

Reporter
144 Wis. 2d 531 *; 424 N.W.2d 411 **; 1988 Wisc. LEXIS 55 ***; 80 A.L.R.4th 173

STATE of Wisconsin, Plaintiff-Respondent, v. Daniel P. McDONALD, Defendant-Appellant-Petitioner

Prior History: [***1] Affirming in part, reversing in part, and remanding *138 Wis. 2d 366, 405 N.W.2d 771 (Ct. App. 1987)*.

Review of a decision of the Court of Appeals.

Disposition: *By the Court.* – The decision of the court of appeals is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Counsel: For the defendant-appellant-petitioner there were briefs by *William J. Hayes* and *Zwicky, Hayes & Helber*, Beloit and *Patrick K. McDonald*, co-counsel, Janesville and oral argument by *Patrick K. McDonald*.

For the plaintiff-respondent the cause was argued by *Steven D. Ebert*, assistant attorney general, with whom on the brief was *Donald J. Hanaway*, attorney general.

Judges: William G. Callow, J. Heffernan, Chief Justice concurring. Day, J. dissenting.

Opinion by: CALLOW

Opinion

[*532] [**412] Daniel P. McDonald seeks review of a published decision of the court of appeals, *State v. McDonald, 138 Wis. 2d 366, 405 N.W.2d 771 (Ct. App. 1987)*, dismissing an appeal from a judgment of conviction and an order denying a motion for abatement of the criminal proceedings ab initio by the circuit court for Lafayette county, Judge Ralph [***2] Adam Fine presiding.

There are two issues before us on review. First, should criminal proceedings against a defendant abate ab initio when the defendant commits suicide while pursuing postconviction relief? Second, if the doctrine of abatement does not apply when the defendant commits suicide while pursuing postconviction relief, does the failure to abate the proceedings violate the defendant's right to equal protection? We conclude that when a defendant dies while pursuing postconviction relief, regardless of whether death is by suicide or by natural causes, the defendant's right to bring an appeal continues. Contrary to the assertions of the parties, the defendant is neither entitled to abatement of the criminal proceedings ab initio nor barred from pursuing an appeal.

[*533] Accordingly, we affirm that part of the decision of the court of appeals which affirmed the circuit court's denial of McDonald's motion for abatement, we reverse that part of the decision which dismissed the appeal from the judgment of conviction, and we remand the cause with instructions for the original appeal of the conviction to continue. Because we conclude that a defendant who dies while pursuing [***3] postconviction relief, regardless of the cause of death, is not entitled to abatement ab initio, we do not reach the defendant's claim that his right to equal protection has been violated.

The facts before us are not in dispute. On June 22, 1985, Daniel McDonald (McDonald) was charged with first-degree murder. McDonald entered pleas of not guilty and not guilty by reason of mental disease or defect. Following a bifurcated trial, McDonald was found guilty of first-degree murder and was sentenced to life imprisonment.

On October 21, 1985, McDonald filed a notice of intent to pursue postconviction relief. McDonald also filed a motion requesting a copy of the trial transcript. Prior to a final resolution of his appeal, McDonald committed suicide. Following McDonald's death, his attorney filed a notice of motion and a motion requesting (1) an order vacating his judgment of conviction and sentence, and

(2) dismissal of the information filed against him.

The circuit court denied McDonald's motion for abatement of the criminal proceedings. According to the court, whether abatement of a criminal proceeding should be granted following a defendant's death pending appeal is a policy question. [***4] After noting that there is a strong public policy against condoning suicide, the court concluded that it was inappropriate [*534] to adopt rules which sanction or encourage suicide or which appear to reward suicide. Because abatement in the case before it would appear to sanction suicide, the court concluded that the rule established in State v. Krysheski, 119 Wis. 2d 84, 349 N.W.2d 729 (Ct. App. 1984) -- the death of a criminal defendant pending direct appeal abates all prior proceedings -- should not apply to a case in which the defendant's death is a result of suicide. Accordingly, the court denied McDonald's motion for abatement.

McDonald, by his attorneys, appealed the order denying his motion for abatement and the judgment of conviction. The court of appeals refused to abate the proceedings, holding that it was inappropriate to vacate criminal proceedings when the defendant commits suicide while pursuing postconviction relief. The court also dismissed the appeal from the judgment of [**413] conviction, apparently on the grounds that the appeal was moot because there was no interest of the defendant to adjudicate. McDonald, 138 Wis. 2d at 370. [***5]

According to the court of appeals, the abatement rule adopted in *Krysheski* is inapplicable when the defendant's death is by suicide. The court of appeals reasoned that, absent evidence to the contrary, it is presumed that an individual who commits suicide does so by choice. While recognizing that death pending appeal deprives the defendant of a final determination of an appeal and that justice normally requires abatement of a conviction where the appeal is unresolved, the court concluded that when the defendant prevents a final determination of the appeal by committing suicide, justice does not require abatement. The court of appeals further noted that to permit abatement would justify the public and the [*535] victim, or the victim's family, in believing that the defendant succeeded in vacating the judgment of conviction through suicide when he would have lost the appeal on the merits. Id. at 368-69.

In a concurring opinion, Judge Sundby argued that the court should reexamine its holding in *Krysheski* and that the court should not adopt a rule that the death of the defendant abates all proceedings ab initio, regardless of the manner in [***6] which the defendant died. Judge Sundby first noted that the historical legal rationale for abating criminal proceedings upon the death of a defendant was based upon the courts' conclusions that, when a financial penalty is imposed upon a defendant, it is unfair to punish the defendant's family by making the family pay the defendant's fine by virtue of an assessment against the estate. He then argued that this rationale is inapplicable when the failure to abate affected only the family. Moreover, because the rule adopted by the majority would be likely to involve the court in exhaustive investigation and litigation concerning the voluntariness of the defendant's death, Judge Sundby advocated instead that the court "adopt a very simple rule covering all deaths pending appeal, i.e., that the appeal is dismissed because the appellant is no longer subject to the jurisdiction of the court." Id. at 373 (Sundby, J., concurring).

On September 15, 1987, we accepted McDonald's petition for review.

Prior to this case, we have never addressed the question of whether criminal proceedings should abate ab initio when the defendant dies while pursuing postconviction [***7] relief. The court of appeals, however, in Krysheski, 119 Wis. 2d at 89, has addressed this issue in the context of a defendant who died of a [*536] heart attack while pursuing an appeal. In *Krysheski*, the court adopted HN1[↑] the federal approach to a defendant's death pending appeal and held that, when a defendant dies pending an appeal of right, all prior criminal proceedings are abated.

The court of appeals first noted that, because the issues surrounding a defendant's conviction become moot if the defendant dies pending appeal, dismissal of the appeal was appropriate. The court continued, however, and stated that not only should the appeal be dismissed but also the criminal proceedings should be abated ab initio. According to the court:

"Abatement of all proceedings is based on the recognition that a defendant pursuing an appeal of right has not yet received all of the safeguards of the judicial system. Death prior to appeal works a deprivation of a final determination of the case's merits. Because an appeal plays an integral part in our system for final adjudication of guilt or innocence, justice requires the abatement of a conviction [***8] where the merits of the appeal are left unresolved." Id. at 88.

We agree with the *Krysheski* court that an appeal plays an integral part in the judicial system for a final adjudication of guilt or innocence and that a defendant who dies pending appeal should not be deprived of the safeguards that an appeal provides. We disagree, however, that the appropriate remedy is to abate the criminal [**414] proceedings ab initio. Instead, we conclude that, when a defendant dies pending appeal, regardless of the cause of death, the defendant's right to an appeal continues.

This court has consistently recognized that HN2[↑] a defendant has a constitutional as well as a statutory right to an appeal. Art. I, sec. 21, Wis. Const.; sec. [*537] 808.03(1), Stats. This right to an appeal, as *Krysheski* notes, is an integral part of a defendant's right to a final determination of the merits of the case. It serves as a safeguard to protect a defendant against errors in the criminal proceedings. A defendant who dies pending appeal, irrespective of the cause of death, is no less entitled to those safeguards.

Moreover, because collateral proceedings may be affected by criminal [***9] proceedings in which it is alleged that an individual took the life of another, it is in the interest of society to have a complete review of the merits of the criminal proceedings. For example, HN3[↑] under sec. 852.01(2m)(b), Stats., a final judgment of conviction of felonious and intentional killing is conclusive evidence that the defendant has feloniously and intentionally killed the decedent, and thus the defendant may not: (1) receive money from the victim's estate under the intestacy statute, sec. 852.01(2m)(a); (2) inherit under the victim's will, sec. 853.11(3m); (3) receive any benefit from a contract in which the victim is the obligee and which names the defendant as the beneficiary, sec. 895.43; (4) receive any benefit, as a beneficiary, payable as a result of the death of the victim, sec. 895.435; (5) receive a benefit, as a beneficiary, from a life insurance policy on the life of the victim, sec. 632.485; and (6) receive the victim's interest in property held in joint tenancy, sec. 700.17(2)(b). [1] Because of these potential collateral consequences, it serves the interest of justice to continue the appeal. By continuing the appeal, the [*538] necessity of initiating separate [***10] civil proceedings will be eliminated if the judgment of conviction is affirmed. If the judgment of conviction is reversed, the collateral rights may be resolved in a civil proceeding.

Furthermore, if we adopted the reasoning of the court of appeals in the present case and distinguish between death by suicide and death by natural causes, future cases would require the court to examine the circumstances of the defendant's death. Permitting an appeal to continue eliminates the myriad of problems which would arise from requiring courts to determine whether the defendant's death was voluntary or involuntary.

Other jurisdictions, although HN4[↑] a minority, [2] have also held that when a defendant dies while pursuing postconviction relief, the appeal [***11] should continue. State v. Jones, 220 Kan. 136, 137, 551 P.2d 801 (1976); New Jersey State Parole Board v. Boulden, 156 N.J. Super 494, 497, 384 A.2d 167 (1978); Commonwealth v. Walker, 447 Pa. 146, 147-48 n. <*>, 288 A.2d 741 (1972). In *Jones*, the Kansas Supreme Court held that HN5[↑] the interest of the family of the defendant and the public in the final determination of a criminal case and the fact that collateral rights are often affected by the criminal proceedings warranted the conclusion that the appeal should be adjudicated on its merits, despite the death of the defendant. Jones, 220 Kan. at 137.

[***12] Similarly, the Pennsylvania Supreme Court in *Walker* rejected the defendant's motion for abatement ab initio and the state's motion for dismissal, concluding [*539] that HN6[↑] "it is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process." Walker, 447 Pa. at 147-48n. *. [**415] We conclude that these decisions articulate the correct rule.

We are not persuaded by the arguments of the parties and the court of appeals that the appeal from the judgment of conviction must be dismissed because the proceedings are moot. As we have noted, society and the deceased have a very real interest in a final determination of the defendant's appeal from the

[1] The legislature recently affirmed that individuals should not profit by their criminal conduct which causes death and expanded that declaration to include juveniles who are adjudicated delinquent on the basis of unlawfully and intentionally killing a person. 1987 Wisconsin Act 222.

[2] The majority of the jurisdictions addressing this issue conclude that the criminal proceedings should abate ab initio. E.g., United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977); State v. Morris, 328 So. 2d 65, 67 (La. 1976); People v. Mezzone, 74 Ill. 2d 44, 48, 383 N.E.2d 947 (1978).

criminal conviction. Under these circumstances, we conclude that McDonald's appeal is not moot.

In summary, we hold that, when a defendant dies while pursuing postconviction relief, irrespective of the cause of death, that the defendant's right to an appeal continues. The defendant is not, moreover, entitled to have the criminal proceedings abated ab initio. The holding [***13] of the court in *Krysheski* -- that the death of a criminal defendant pending direct appeal abates all prior proceedings -- is overruled.

Because McDonald properly initiated the appellate process prior to his death, he is entitled to a final determination of his appeal. We recognize that the defendant's input into the appeal process is a significant factor, but this consideration is overcome by the fact that the appeal process reviews the appeal based upon the record and cannot be modified by a defendant's action. Accordingly, we remand this cause to the court of appeals with directions to continue McDonald's original appeal from the judgment of conviction.

[*540] *By the Court.* -- The decision of the court of appeals is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Concur by: HEFFERNAN

Concur

HEFFERNAN, CHIEF JUSTICE (concurring).

I join in the opinion of the court but concur specially to respond to the dissent.

It may well be, as the dissent suggests, that the defendant in this case is in the hands of God. However, the responsibility for resolving the legal uncertainties left behind is squarely in the hands of this court. [***14] It is no answer to that responsibility to abdicate our judicial duty to another power. Indeed, it would be a violation of our oath to administer justice to do so.

We operate in a constitutional society, with a "wall of separation between church and state." [1] In this case, that wall fences us on the side of the living and charges us with responsibility for determining whether legal error was made in the trial of Daniel P. McDonald (McDonald). It is not his appeal which is moot, as the dissent would have it, but rather it is his death which is moot, because he did not take the potential errors of our justice system into the grave with him.

These potential errors remain behind to perplex and confound his relatives, friends, reputation, and the legal system. Indeed, an important point of the majority opinion is that these errors remain behind to worry society at large, because such [***15] important collateral matters as inheritance, insurance benefit distribution, and distribution of various property may wind [*541] up being conclusively determined without benefit of a review for error in the potentially controlling criminal action. [2]

For these reasons, I suggest that the dissent suffers from a lack of focus. This court seeks not to extend its grasp "from here to eternity," but to discharge its duty in the here and now of civil society in order to unravel the potential legal problems caused by McDonald's death pending appeal.

Dissent by: DAY

Dissent

DAY, J. [***16] (dissenting).

The majority opinion has now extended this court's jurisdiction over criminal defendants [**416] beyond the grave. Its appellate grasp now reaches "from here to eternity!"

But the grave should end this court's involvement with the defendant. We trust the defendant -- and his victim -- are in the hands of one whose judgments "are true and righteous altogether." Our judgments, even at their best, are but imperfect reflections of absolute justice. We should recognize that the death of Judge McDonald ended this court's role in this matter. This case should

[1] Thomas Jefferson, Reply to Messrs. Dodge et al., letter of January 1, 1802, collected in Padover, *The Complete Jefferson*, 518-19.

[2] Further, the dissent's point regarding the relevance of such collateral matters as inheritance to the facts of this case is unclear. Dissent, at 543-544. Does the dissent mean to imply that one rule should apply when collateral matters are at issue and another when collateral matters are not at issue? This would be tantamount to allowing or disallowing a right of appeal based on the identity of the victim -- a novel approach which surely should be rejected.

be dismissed as moot.

Judge McDonald was convicted of first degree murder for the killing of the young law partner of the man who had recently defeated Judge McDonald in his re-election bid for Circuit Court Judge of Lafayette [*542] county. Judge McDonald committed suicide in prison after starting an appeal of his conviction.

The majority of this court has decided that the appeal should proceed in spite of the fact the he is dead by his own hand. The theory is that the dead or those who survive them should have the opportunity for "vindication" by allowing an appeal of his conviction to go forward. But for what purpose?

[***17] The most that could happen would be that a majority might hold an error occurred in the trial warranting a new trial. Does that "vindicate" the deceased? Hardly. There is not going to be a determination that the deceased was "not guilty." That issue will never be retried. The majority opinion might make sense if it held that if a new trial was granted to the deceased, he would be retried "in absentia." That isn't going to happen. The law provides that deceased persons may be plaintiffs or defendants by their personal representatives so that resolution of such issues as their negligence or culpability for fraud or theft resulting in civil liability may proceed and their ultimate "vindication" or "condemnation" can begin, be tried, appealed, and if prejudicial error is found, reversed and be tried over again. But it is obvious that this court is not prepared to hold that this should be done with deceased criminal defendants.

The majority opinion (at 551) cites various statutes that adversely affect the right of an intentional felonious killer to profit from the death of his victim.

The principal statute in *sec. 852.01(2m)* which reads as follows:

"**852.01 Basic rules for intestate [***18] succession . . . . (2m) REQUIREMENT THAT HEIR NOT HAVE INTENTIONALLY KILLED THE DECEASED.** [*543] (a) If any person who would otherwise be an heir under sub. (1) has feloniously and intentionally killed the decedent, the net estate not disposed of by will passes as if the killer had predeceased the decedent.

"(b) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this subsection. In the absence of such a conviction, the court, on the basis of clear and convincing evidence, may determine whether the killing was felonious and intentional for purposes of this subsection.

"(c) This subsection does not affect the rights of any person who, before rights under this subsection have been adjudicated, purchases for value and without notice from the killer property that the killer would have acquired except for this subsection; but the killer is liable for the amount of the proceeds. No insurance company, bank or other obligor paying according to the terms of its policy or obligation is liable because of this subsection unless before payment it has received at its home office or principal address written notice of a claim under this subsection."

[***19] Each of the statutes cited in addition to the above, i.e., *secs. 853.11(3)*, *895.43*, *895.435*, 632.485, *700.17(2)(b)* all provide: "*Section 852.01(2m)(b)* and *(c)* applies to this section" (or "paragraph").

In any of the statutory possibilities if the time for appeal had expired, the convicted one could not profit from his victim's death. If, however, an appeal had been started and the killer died prior to the appeal determination no "presumption" as to his guilt or innocence would be effective and that issue would be tried under any of the cited statutes in a civil court. [*544] There the burden [**417] of proving intentional felonious killing under *sec. 852.01(2m)(b)*, Stats., is "clear and convincing evidence" *not* "beyond a reasonable doubt" as in a criminal case. Thus, even if an appellate court found there was not sufficient evidence to convict the defendant beyond a "reasonable doubt" and reversed the conviction and dismissed the criminal charge, ***the case would still go to trial as a civil case under sec. 852.01(2m)(b), Stats.!***

This shows the futility of the procedure the majority adopts today. It does nothing.

In the case before us there is no claim that Judge McDonald [***20] stood to profit from his victim's death. Thus ***there is absolutely nothing to be gained by the procedure adopted by the majority today.***

The better rule is that in criminal cases death moots the matter at whatever stage of the proceedings it occurs. If a person is charged and dies before coming to trial that ends the matter; it is moot.

If a person is in the process of being tried and dies, the trial should end. The possibility of a finding of guilt or innocence is ended. It's moot; it's over. No matter how insistent those near and dear to the accused might be in

demanding that the trial proceed, and claim that proof could be offered to vindicate the accused, the trial cannot go forward without the criminal defendant.

If one convicted took an appeal, won a new trial and died before the trial could take place, the matter would be moot and what might have happened in a new trial will forever remain unknown.

So it should be with the proceedings here before us, where an appeal was initiated in time but the convicted defendant died before the appeal was heard. The matter should be treated the same as in the [*545] hypothetical situations illustrated above — it should be [***21] recognized as moot.

Suppose a defendant, represented at trial by the public defender, was convicted and then the public defender filed an appeal. Further suppose the defendant died before the appeal was heard. Further suppose the deceased defendant had no relatives, no personal representative, because he owned no property, and no "friends." What should be done? Is the public defender to be ordered at public expense to proceed with the appeal to "vindicate" the deceased? To ask the question seems to point up the absurdity of the rule adopted today by the majority. Any interest "society" might have in the matter (Majority opinion at pages 537-539) would be better served by declaring such a case moot.

There is no end to the slippery slope down which the majority has started to slide. For instance, while there is a limit on appeal time for alleged error at trial, there is no such limit when constitutional error is claimed. Section 974.06, Stats., provides:

"**Postconviction procedure.** (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court claiming the right to be released upon the ground that [***22] the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[*546] "(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time . . . .

"(b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977 . . . .

"(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing . . . ."

After the time for appeal is long gone and the defendant is long dead, what stops a relative, or "friend," or anyone else from bringing a sec. 974.06, Stats., motion to set [**418] aside the conviction and order a new trial? Under the reasoning of the majority the answer is: "nothing." It could be an interesting "full employment" [***23] program for the legal profession to dig up old files from years back and start the process of "vindication" for those long gone to their reward.

Furthermore, this court has already resolved the issue of what to do with a case that involved the vindication of a man's reputation, when he died after his case was briefed and argued in this court but before a decision was mandated. The case is *State ex rel. Steiger v. Eich, 86 Wis. 2d 390, 272 N.W.2d 380 (1978)*.

While *McDonald* is a criminal case, the *Steiger* matter involved a John Doe proceeding. A John Doe investigation is about the closest thing to a criminal proceeding that we have without being denominated as such. This proceeding was directed solely against Congressman William A. Steiger and he was the only witness called. Clearly, as a Congressman and as a [*547] citizen, his reputation was "on the line." His refusal to obey an order to name the sources of his information on vote fraud subjected him to possible incarceration.

The case arose because a large number of people involved in the political process in Wisconsin wanted to make it easier for citizens to register to vote. They [***24] got legislation passed which established a system of election day registration at the polls. William A. Steiger, a United States Congressman for the Sixth District of Wisconsin and former state legislator, had evinced a longtime interest in these matters. He expressed concern that the system adopted in Wisconsin and being considered by Congress for nation-wide application made voter registration fraud easier and more likely. He publicly stated that three University of Wisconsin students from Madison had visited him in his offices in Washington, D.C. and told him that each had managed to vote twice in the Presidential election of 1976 in Madison. They cited

their experience as showing a need for Congress to tighten up the voter registration law which was a "hot" political issue in Congress. Following his revelation of these conversations, Congressman Steiger was asked to reveal the names of the students by the Dane County District Attorney. He refused and claimed it was a privileged communication to him under the *Speech and Debate Clause of the United States Constitution*.

In a letter to the Congressman from the Dane County District Attorney dated June 1, 1977 (Exhibit L to Steiger [***25] Affidavit dated Sept. 28, 1977), the District Attorney said:

"Again, I find it surprising that a person claiming great concern about voter fraud refuses to cooperate with those charged with the enforcement of the [*548] law. No election law which you might design will protect against voter fraud unless it provides for the prosecution of its violators and unless citizens concerned with the integrity of the electoral process cooperate in its enforcement."

The matter became a political "cause celebre." *The Capital Times* of Madison on May 18, 1977 (Exhibit H to Baldwin Affidavit filed April 28, 1978 in this court), headlined a story, **"Doyle calls vote fraud hearing -- Steiger is asked to appear voluntarily."** The story read in part as follows:

"Dane County District Attorney James E. Doyle, Jr. said today he will ask U.S. Rep. William Steiger (R-Oshkosh) to appear voluntarily before a John Doe hearing in Dane County in an investigation of voter fraud allegations made by Steiger . . . .

"Steiger said this spring in a broadcast interview that he had evidence of voter fraud in Madison, a charge which has been repeatedly made by Republicans but which has never been proved.

[***26] "Steiger was one of 10 House Republicans who demanded Monday that Milwaukee County District Attorney E. Michael McCann turn over a memorandum which they charged, shows serious potential for vote fraud in the new Wisconsin system which allows voters to register at the polls.

"The demand by Republicans is seen as a move to discredit President Jimmy Carter's proposed legislation to pattern national [**419] voter registration laws after Wisconsin's system . . . .

"Doyle requested the John Doe hearing after Steiger repeatedly refused to turn over the names of the three persons who allegedly admitted to him [*549] they had voted more than once during the 1976 presidential election . . . .

"A John Doe hearing, under state law, can be called to investigate possible wrong-doing, but does not necessarily mean a crime has been committed . . . .

"Doyle said the alleged violations are felonies under Wisconsin law, . . ."

Following correspondence between the City Clerk, the District Attorney and the Congressman, Judge William F. Eich commenced the "John Doe" proceeding at the request of the District Attorney. Congressman Steiger was subpoenaed. He appeared and refused to divulge the names [***27] of the students who had told him of their double voting under claim of privilege pursuant to the Speech and Debate Clause, Art. I, sec. 6 of the United States Constitution. (Transcript of Proceedings before Judge Eich Aug. 24, 1977, attachment IV to affidavit of Attorney Gordon B. Baldwin filed April 28, 1978.)

On February 28, 1987, Judge Eich issued a Memorandum Decision denying Congressman Steiger's claim of immunity. Among other things the decision said:

"I have determined that his [Steiger's] actions were not speech or debate and that he had no privilege under Art. I, Sec. 6. I thus consider Mr. Steiger's argument as to the chilling effect and his argument on 'federal supremacy' to be without merit.

"I hold, therefore, that Mr. Steiger has no constitutional or other privilege to refrain from answering questions as to the identity of the persons who admitted to him that they had violated the criminal laws of Wisconsin . . . . [T]he acts admitted to by [*550] the students constitute a felony -- a serious offense in Wisconsin -- and Mr. Steiger is the only person possessing this evidence. It would be no different in principle if the Congressman's visitors had admitted [***28] complicity in several unsolved bank robberies (or murders!) in the State of Wisconsin."

Congressman Steiger through one of his attorneys, Professor Gordon B. Baldwin, of the University of Wisconsin Law School, petitioned this court for a Writ of Prohibition directed against Judge Eich and District Attorney Doyle.

In his Petition for Issuance of a Writ of Prohibition in this court, among the reasons given as to why this court

should take the case, the petition stated:

"The Circuit Court's opinion of February 10, 1978, involves questions about the scope of the protections afforded to Members of Congress and the general public by the Speech or Debate Clause (Art. I sec. 6) and *First Amendment of the United States Constitution* and by the Federal structure of the American government. This Court has not previously answered these questions, which involve sufficient compelling interests to the public to warrant entertainment of this original action . . . .

"*Irreparable harm to the petitioner* and to the legislative independence of the Congress of the United States will continue if the Circuit Court's decision is not vacated, . . ." (Petition, p. 2.) (Emphasis added.)

In his **[***29]** *Memorandum in support of the petition*, p. 17, counsel for Congressman Steiger stated:

"The adverse effects of the ruling below would be felt by Congressman Steiger and by all other members of Congress."

[*551] An order to show cause was issued and oral argument took place on June 7, 1978.

On June 8, 1978, this court granted petitioner's request that it take original jurisdiction to consider the merits of the petition "because the case is a matter Public juris." The case was ordered placed on the court's September, 1978 calendar for On Brief disposition.

Congressman Steiger passed away on December 4, 1978, before this court issued its opinion. On December 22, 1978, this court dismissed the action as moot. This court said at p. 391:

[420]** "Congressman Steiger died on December 4, 1978. A decision on the merits of this dispute can have no practical legal effect upon any existing controversy. The case is therefore moot, . . ."

If this court found against him he could have appealed to the United States Supreme Court. If this court had agreed with the Congressman's position, it would have vindicated his judgment and his conception of his proper role as a Congressman and **[***30]** would undoubtedly have provided comfort to his family and friends. That might have been true had he lived, but he died and the right to vindication or condemnation ended with his death. So likewise should the issue in the case before us be resolved. This court should not have one rule for deceased congressmen and another for deceased judges.

The majority have rightly overruled *State v. Krysheski, 119 Wis. 2d 84, 349 N.W.2d 729 (Ct. App. 1984)*, which held death voided a conviction from the beginning, i.e., "abated" the entire action. That result, though supported in some jurisdictions, is wrong and the majority rightly overruled it. But the majority is **[*552]** equally in error in saying an appeal may continue. If the conviction is upheld on appeal, what good does that do the dead man or those who cherish his memory? Better for all concerned if the matter is recognized as moot.

A majority of the present court was also on this court when the *Steiger* case was dismissed. This court should follow the reasoning of its own precedent in *Steiger* and recognize that death has ended the case.

Judge Sundby stated it well in his concurrence in *State v. McDonald, 138 Wis. 2d 366, 373, 405 N.W.2d 771 (1987)*:

[*31]** "I believe it is better to adopt a very simple rule covering all deaths, pending appeal, i.e., that the appeal is dismissed because the appellant is no longer subject to the jurisdiction of the court."

There is nothing we can do for the deceased. A wise man long ago said of the dead:

"Their love and their hate and their envy have already perished, and they have no more for ever any share in all that is done under the sun. *Ecclesiastics*, 9:6 (RSV)."

This court should recognize its own logical limitations. It should follow *Steiger* and dismiss this case as moot.

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State v. Burrell

Supreme Court of Minnesota

October 2, 2013, Filed

A11-1517

Reporter
837 N.W.2d 459 *; 2013 Minn. LEXIS 402 **; 2013 WL 5460887

State of Minnesota, Respondent, vs. Mark Myrl Burrell, Appellant.

Prior History: [**1] Court of Appeals.

State v. Burrell, 2012 Minn. App. Unpub. LEXIS 1258 (Minn. Ct. App., Nov. 7, 2012)

Disposition: Reversed, convictions vacated, and remanded.

Counsel: Lori Swanson, Attorney General, Saint Paul, Minnesota; and Kristen Nelsen, Mower County Attorney, Jeremy Clinefelter, Assistant County Attorney, Austin, Minnesota, for respondent.

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

Judges: GILDEA, Chief Justice. Dissenting, Dietzen, J. Took no part, Wright, [**2] and Lillehaug, JJ.

Opinion by: GILDEA

Opinion

[*461] GILDEA, Chief Justice.

Appellant Mark Myrl Burrell filed a direct appeal challenging his forgery convictions. While his direct appeal was pending in the Minnesota Court of Appeals, Burrell died. Defense counsel filed a motion to abate the prosecution *ab initio*, arguing that Burrell's death required the court of appeals to vacate the convictions and remand to the district court with instructions to dismiss the complaint. After denying the abatement motion, the court of appeals dismissed the appeal. Because we conclude that ***HN1***[↑] a prosecution should abate *ab initio* when the defendant dies during an appeal of right from a final judgment of conviction in which restitution is not at issue, we reverse the court of appeals' denial of the abatement motion, vacate Burrell's convictions, and remand to the district court with instructions to dismiss the complaint.

This case arises from the decision of Burrell and his brother, Steven Burrell ("Steven"), to switch identities. After the brothers had lived as each other for approximately 12 years, attorneys advised both of them that they had been living as each other for so long that it was impossible to stop. Attorneys also advised [**3] Burrell and his brother, however, that there were certain things, including marriage and the purchase of property, they should do under their legal names. Steven later purchased two properties in Austin, one at 204 South Main and one at 1604 East Oakland, under his own name. Steven and the brothers' mother lived at the 204 South Main address, and Burrell lived at both addresses at various times.

By 2007, Steven had moved to Florida. While Steven was living in Florida, the Mower County Auditor-Treasurer's Office sent a letter to Steven advising him that because he had not paid property taxes for several years, both Austin properties were going into forfeiture. The letter stated that Steven could avoid forfeiture by signing a confession of judgment for each property, which is an agreement to pay the delinquent property taxes at a payment schedule of 10 percent of the owed amount per year. Steven was unable to return to Minnesota to sign the confessions of judgment and authorized Burrell to sign on his behalf and pay the taxes. Burrell consulted with an attorney, who advised him that he could sign the confessions of judgment and pay the taxes as long as he did not intend to defraud anyone [**4] or benefit from it. Accordingly, on December 21, 2007, Burrell, pretending to be Steven, signed the two confessions of judgment as Steven Burrell. Burrell made the required payments from December 2007 until February 2010.

On January 17, 2010, Steven died intestate in Nebraska. Burrell went to the Mower County Auditor-Treasurer and asked if there was a way to transfer Steven's two Austin properties to Burrell without going through probate. Burrell, who had been living in Austin as Steven Burrell, explained that he was really Mark Burrell, not Steven; that he and his brother had been switching identities for years; and that he wanted to transfer title to the properties to the name of Mark Burrell. The auditor-treasurer notified police that there was an individual who had entered into an agreement with Mower County as Steven Burrell but who now claimed to be Mark Burrell.

Austin police investigated and determined that Burrell had identified himself to several people in Austin as both Steven [*462] and Mark Burrell. Additionally, police determined that the late Steven Burrell had been living in Nebraska under the name of Mark Burrell. At the conclusion of the investigation, Burrell was charged [**5] with two counts of aggravated forgery in violation of Minn. Stat. § 609.625, subd. 1(1) (2012), one count for each of the confessions of judgment that Burrell signed in December 2007. [1]

Following a jury trial, Burrell was found guilty of both counts of aggravated forgery. The district court convicted Burrell of both offenses and sentenced him to 12 months and 1 day in prison for each charge, to be served concurrently. The court also imposed a $3,000 fine, which is still outstanding, but no restitution was sought or awarded.

Burrell filed a direct appeal in the Minnesota Court of Appeals challenging his convictions and sentence. [**6] Burrell raised five issues in his direct appeal:(1) insufficient evidence to support the convictions; (2) plain error in the jury instruction for intent to defraud; (3) error in permitting the alternate juror to deliberate; (4) prosecutorial misconduct during closing argument; and (5) error in imposing a sentence for each conviction. [2]

Oral argument was held in the court of appeals on June 20, 2012.

Five days later, on June 25, 2012, defense counsel was informed that police had discovered Burrell's body in his home in Nebraska. On July 5, 2012, defense counsel filed a motion in the court of appeals to abate the prosecution *ab initio*.

The court of appeals denied the motion, explaining that although the doctrine of abatement *ab initio* was "not itself new, its use in this factual context in Minnesota would be new." State v. Burrell, No. A11-1517, 2012 Minn. App. Unpub. LEXIS 1258 at *2, Order Opinion (Minn. App. filed Nov. 7, 2012) [**7]. Noting a recent trend in other jurisdictions to limit the doctrine, the court of appeals concluded that it was "not fitting for us to adopt and apply the abatement *ab initio* doctrine here." *Id.* After denying the motion to abate the prosecution *ab initio*, the court of appeals dismissed Burrell's direct appeal. We granted Burrell's petition for review.

Burrell argues that the doctrine of abatement *ab initio* requires the appellate court to vacate his convictions and remand to the district court with instructions to dismiss the complaint because he died during the pendency of his appeal of right from a final judgment of conviction. The State argues that we should simply dismiss Burrell's appeal. HN2[↑] Whether to adopt the doctrine of abatement *ab initio* is a question of law that we review de novo. In re McCaskill, 603 N.W.2d 326, 327 (Minn. 1999).

I.

Before turning to the parties' arguments, we begin with a discussion of the doctrine of abatement *ab initio*. HN3[↑] "Abatement" is defined as the discontinuance of a [*463] legal proceeding "for a reason unrelated to the merits of the claim." *Black's Law Dictionary* 3 (9th ed. 2009). "*Ab initio*" means "[f]rom the beginning." *Id.* at 5.

The federal circuit [**8] courts have uniformly adopted a rule that HN4[↑] death pending direct review of a criminal conviction discontinues not only the appeal but also all proceedings in the prosecution from the beginning. Durham v. United States, 401 U.S. 481, 483,

[1] Although Burrell was also charged with possession of a short-barreled shotgun and theft, those charges were dismissed before trial. When the State included information about the dismissed charges in its brief and appendix, Burrell moved to strike the information, arguing that it is outside the record in this case. Because we conclude that the information in question is outside the record on appeal, we grant the motion to strike. *See* Holt v. State, 772 N.W.2d 470, 481 n.5 (Minn. 2009) (striking references to a criminal complaint that was outside the record on appeal).

[2] The State concurred that the district court erred in imposing multiple sentences for a single behavioral incident and joined Burrell in his request to vacate one of the sentences. In light of our holding that Burrell's convictions abate and the complaint against him must be dismissed, Burrell's request is moot.

91 S. Ct. 858, 28 L. Ed. 2d 200 (1971), overruled to the extent that it is inconsistent by Dove v. United States, 423 U.S. 325, 96 S. Ct. 579, 46 L. Ed. 2d 531 (1976).[3] This rule is commonly referred to as the doctrine of abatement *ab initio*. United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004). When "death has deprived the accused of his right to" appellate review of his conviction, "the interests of justice ordinarily require that [the defendant] not stand convicted without resolution of the merits of his appeal, which is an integral part of our system for finally adjudicating his guilt or innocence." *Id. at 413-14* (emphasis omitted) (quoting United State v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980)).[4]

Among the states, the most common approach among courts that have addressed [*464] the issue is to hold that *HN5*[↑] when a criminal defendant dies while his appeal is pending, the doctrine of abatement *ab initio* applies.[5] *In re Estate of Vigliotto, 178 Ariz. 67, 870 P.2d 1163, 1165 (Ariz. Ct. App. 1993); People v. St. Maurice, 166 Cal. 201, 135 P. 952, 952 (Cal. 1913);* People v. Daly, 313 P.3d 571, 2011 Colo. App. LEXIS 844, 2011 WL 2308587, at *8 (Colo. App. June 9, 2011); People v. Robinson, 187 Ill. 2d 461, 719 N.E.2d 662, 664, 241 Ill. Dec. 533 (Ill. 1999); O'Sullivan v. People, 144 Ill. 604, 32 N.E. 192, 194 (Ill. 1892); State v. Kriechbaum, 219 Iowa 457, 258 N.W. 110, 113 (Iowa 1934); State v. Morris, 328 So. 2d 65, 67 (La. 1976); State v. Carter, 299 A.2d 891, 895 (Me. 1973); Commonwealth v. Elsen, 368 Mass. 813, 334 N.E.2d 14, 14 (Mass. 1975); State v. Forrester, 579 S.W.2d 421, 421 (Mo. Ct. App. 1979); [**12] State v. Campbell, 187 Neb. 719, 193 N.W.2d 571, 572 (Neb. 1972); State v. Poulos, 97 N.H. 352, 88 A.2d 860, 861 (N.H. 1952); People v. Matteson, 75 N.Y.2d 745, 551 N.E.2d 91, 92, 551 N.Y.S.2d 890 (N.Y.

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[3] Of the federal courts of appeal that have considered the question of what to do when a criminal defendant dies while his appeal is pending, all have adopted the doctrine of abatement *ab initio*. United States v. Rich, 603 F.3d 722, 724 (9th Cir. 2010); United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004); [**9] United States v. Christopher, 273 F.3d 294, 299 (3d Cir. 2001); United States v. Wright, 160 F.3d 905, 908 (2d Cir. 1998); United States v. Pogue, 19 F.3d 663, 665, 305 U.S. App. D.C. 224 (D.C. Cir. 1994); United States v. Davis, 953 F.2d 1482, 1486 (10th Cir. 1992); United States v. Schumann, 861 F.2d 1234, 1236 (11th Cir. 1988); United States v. Dudley, 739 F.2d 175, 176-77 (4th Cir. 1984); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975); Crooker v. United States, 325 F.2d 318, 319 (8th Cir. 1963).

[4] The Supreme Court has approved the federal circuit courts' adoption of the doctrine of abatement *ab initio*. Durham, 401 U.S. at 483 (vacating affirmance of defendant's conviction and remanding to the district court "with directions to dismiss the indictment"). In *Durham*, the Court called the unanimity of the courts that have considered the impact of a defendant's death on a pending appeal as of right from a final judgment of conviction "impressive," and said that the federal circuit courts "have adopted the correct rule." *Id.* But in Dove v. United States, 423 U.S. 325, 96 S. Ct. 579, 46 L. Ed. 2d 531 (1976), the Supreme Court declined to apply abatement. Like *Durham*, [**10] the defendant in Dove died while his request for discretionary review of a court of appeals' decision that *affirmed* his conviction was pending before the Court. Dove, 423 U.S. at 325; *United States v. Dove, 506 F.2d 1398 (4th Cir. 1974)* (unpublished table decision). The Court in *Dove* dismissed the petition for a writ of certiorari, allowed the conviction to stand, and explicitly stated that Durham was overruled "[t]o the extent that [it] may be inconsistent with this ruling." Dove, 423 U.S. at 325.The federal circuit courts have acknowledged the Supreme Court's holding in *Dove*, but have declined to adopt its holding in proceedings before those courts due to the distinction between appeals of right before the federal circuits and discretionary appeals to the Supreme Court. *See, e.g.,* United States v. Christopher, 273 F.3d 294, 296 (3d. Cir. 2001) ("In most criminal cases, proceedings in the Supreme Court differ from those in the Courts of Appeals in one fundamental respect: appeals to the Courts of Appeals are of right, but writs of certiorari are granted at the discretion of the Supreme Court."); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) ("The Supreme Court may [**11] dismiss the petition without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right . . . . [But] when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal . . . .").

[5] Unlike other states, Oregon's policy, which is a combination of abatement and dismissal, is contained in a court rule. Or. R. App. P. 8.05. The rule provides that upon learning of the defendant's death, any party may notify the court and the court should dismiss the appeal. *Id.* at 8.05(2)(b)-(c). If the appeal is the State's appeal, the appeal is simply dismissed. *Id.* at 8.05(2)(c)(i). If it is the defendant's appeal and "the defendant has made an assignment of error that, if successful, would result in reversal of the conviction, the court will vacate the judgment and dismiss the appeal." *Id.* at 8.05(2)(c)(ii). Also, "if the defendant has assigned error only to . . . the [**13] sentence," the court will dismiss the appeal but not vacate the judgment. *Id.* at 8.05(2)(c)(iii). But, "[i]f the defendant has assigned error to a monetary provision of the sentence, the court will dismiss the appeal and vacate the challenged monetary provision." *Id.*

1989); State v. Dixon, 265 N.C. 561, 144 S.E.2d 622, 622-23 (N.C. 1965); Nott v. State, 91 Okla. Crim. 316, 218 P.2d 389, 389 (Okla. Crim. App. 1950); State v. Marzilli, 111 R.I. 392, 303 A.2d 367, 368 (R.I. 1973); State v. Clark, 260 N.W.2d 370, 370-71 (S.D. 1977); Carver v. State, 217 Tenn. 482, 398 S.W.2d 719, 720-21 (Tenn. 1966); Vargas v. State, 659 S.W.2d 422, 423 (Tex. Crim. App. 1983); State v. Free, 37 Wyo. 188, 260 P. 173, 173 (Wyo. 1927).

According to these courts, HN6[↑] the purpose of criminal prosecutions is to punish the defendant, and it is useless to continue such prosecutions when the defendant is dead. Robinson, 719 N.E.2d at 663; accord O'Sullivan, 32 N.E. at 192; Carver, 398 S.W.2d at 720; Matteson, 551 N.E.2d at 92 ("If affirmed, the judgment of conviction could not be enforced and, if reversed, there is no person to try." (citation omitted) (internal quotation marks omitted)). Additionally, "death places a defendant beyond the court's power to enforce or reverse the judgment of conviction, thereby preventing effective appellate review of the validity of the conviction." Matteson, 551 N.E.2d at 92; accord Kriechbaum, 258 N.W. at 113; Morris, 328 So. 2d at 67; Carver, 398 S.W.2d at 720; Vargas, 659 S.W.2d at 422 ("The death of the appellant during the pendency of the appeal deprives this Court of jurisdiction.").

There are several states, however, that [**14] have declined to adopt the doctrine of abatement *ab initio*. In ten of these states, the death of a criminal defendant during the pendency of his appeal renders the appeal moot, and the appeal is dismissed and the conviction stands. Wheat v. State, 907 So. 2d 461, 464 (Ala. 2005); [6] [*465] State v. Trantolo, 209 Conn. 169, 549 A.2d 1074, 1074 (Conn. 1988); Perry v. State, 575 A.2d 1154, 1156 (Del. 1990); Harris v. State, 229 Ga. 691, 194 S.E.2d 76, 77 (Ga. 1972); State v. Korsen, 141 Idaho 445, 111 P.3d 130, 135 (Idaho 2005); Whitehouse v. State, 266 Ind. 527, 364 N.E.2d 1015, 1016 (Ind. 1977); Royce v. Commonwealth, 577 S.W.2d 615, 616 (Ky. 1979); People v. Peters, 449 Mich. 515, 537 N.W.2d 160, 163 (Mich. 1995); State v. Benn, 2012 MT 33, 364 Mont. 153, 274 P.3d 47, 50 (Mont. 2012); State v. Anderson, 281 S.C. 198, 314 S.E.2d 597, 597 (S.C. 1984). The courts in these states recognize that the judicial power of the courts is limited to justiciable controversies. Benn, 274 P.3d at 50 (citation omitted) (internal quotations marks omitted). If, therefore, "the issue presented at the outset of the action has ceased to exist or is no longer live, or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, [**15] then the issue before the court is moot." Id. at 50 (internal quotation marks omitted); accord Trantolo, 549 A.2d at 1074; Royce, 577 S.W.2d at 616.

Further, these courts believe dismissal of the appeal is appropriate because "[a] conviction . . .removes the presumption of innocence, and the pendency of an appeal does not restore that presumption." Wheat, 907 So. 2d at 462; accord Whitehouse, 364 N.E.2d at 1016; Peters, 537 N.W.2d at 163. Dismissing the appeal, according to these courts, also avoids many of the pitfalls of abatement, including "deny[ing] the victims the fairness, respect and dignity guaranteed [under the law] by preventing the finality and closure they are designed to provide." [7] Korsen, 111 P.3d at 135.

Recently, several states have begun to move away from abatement *ab initio* or automatic dismissal upon the death of the defendant. Currently, fourteen states do not preclude appellate courts from considering the merits of a deceased criminal defendant's appeal. State v. Carlin, 249 P.3d 752, 762-63 (Alaska 2011); State v. Clements, 668 So. 2d 980, 982 (Fla. 1996); State v. Makaila, 79 Haw. 40, 897 P.2d 967, 972 (Haw. 1995); State v. Jones, 220 Kan. 136, 551 P.2d 801, 804 (Kan. 1976); Surland v. State, 392 Md. 17, 895 A.2d 1034, 1045 (Md. 2006); [**17] Gollott v. State, 646 So. 2d 1297, 1303-04 (Miss. 1994); State v. Gartland, 149 N.J. 456, 694 A.2d 564, 569 (N.J. 1997); State v. Salazar, 1997-NMSC-

[6] Alabama applies a variation of the dismissal doctrine in which the appellate court dismisses the appeal but instructs the trial court to place a notation in the record stating that "the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed." Wheat, 907 So.2d at 464.

[7] In [**16] some jurisdictions, such as Montana, the courts recognize that restitution "may remain a viable and concrete issue" and allow that "upon a defendant's death, the task of demonstrating that the appeal has not been mooted will be the burden of the defendant's personal representative." Benn, 274 P.3d at 51. Consequently, "[I]f the defendant's representative establishes that the appeal involves concrete issues beyond those which are individual or personal to the defendant, for which this Court can grant effective relief, then the appeal may proceed." Id. Other courts, however, hold that "the logic that supports dismissing the appeal also supports enforcing the order of restitution." Peters, 537 N.W.2d at 166.

044, 123 N.M. 778, 945 P.2d 996, 1004 (N.M. 1997); State v. McGettrick, 31 Ohio St. 3d 138, 31 Ohio B. 296, 509 N.E.2d 378, 382 (Ohio 1987); Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741, 744 (Pa. 1972); State v. Christensen, 866 P.2d 533, 536-37 (Utah 1993); Bevel v. Commonwealth, 282 Va. 468, 717 S.E.2d 789, 795-96 (Va. 2011); State v. Webb, 167 Wn.2d 470, 219 P.3d 695, 699 (Wash. 2009); State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 414-15 (Wis. 1988). If, after considering the merits of the appeal, the appellate court concludes that the trial court erred and a new trial is required, the defendant's conviction then abates due to the court's inability to retry a deceased [*466] defendant. Webb, 219 P.3d at 699 ("If the substituted party appellant is successful in showing that defendant's conviction must be reversed, then, because remand for a retrial is impossible, the conviction and all associated financial obligations must be abated."); Gartland, 694 A.2d at 569 ("The defendant can no longer be retried for the crime."); Christensen, 866 P.2d at 537 ("If there is a reversal or a remand, defendant cannot be retried and the civil judgment abates."). [8]

The primary virtue of allowing the appeal to proceed [**20] is that "[i]t preserves both the presumptive validity of the judgment and the ability of the defendant, through a substituted party appointed for his or her benefit, to maintain the defendant's challenge to it." Surland, 895 A.2d at 1045. Consequently, "[i]t protects the interests of both parties and of the public generally and, because there are so very few instances in which the problem arises, [continuing the appeal] should create no appreciable burden for anyone." *Id.* The defendant's right to an appeal is well recognized as "an appeal plays an integral part in the judicial system for a final adjudication of guilt or innocence and . . . a defendant who dies pending appeal should not be deprived of the safeguards that an appeal provides." McDonald, 424 N.W.2d at 413. Also, a deceased defendant's right to appeal was recognized at common law, where "an attainder of felony would not be affected by the death of the defendant, but that his executor or heirs could pursue a writ of error in his stead." Bevel, 717 S.E.2d at 795. Further, although some aspects of the appeal may be moot due to the defendant's death, "a criminal appeal, even after the defendant has died, may remain a 'present, [**21] live controversy.' Often, there will be a financial component . . . to a criminal judgment, and the appeal will thus have financial consequences for the defendant's estate." Carlin, 249 P.3d at 764. Also, "no prejudice is suffered by the [*467] deceased or his interests in allowing the appeal to continue" when "[t]he Defendant had an opportunity to participate fully in his appeal" prior to his death. Salazar, 945 P.2d at 1004.

In addition to the preservation of the defendant's rights, courts have identified public policy considerations supporting the continuation of a deceased criminal defendant's appeal. In *Gollott v. State*, the Mississippi Supreme Court stated that continuation of the appeal is helpful because "our lawmakers and practitioners need to be made aware of errors committed at the trial court level. Leaving convictions intact without review by this

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[8] Of the states that [**18] allow appellate courts to consider the merits of a deceased criminal defendant's appeal, there is a split on whether the court should order substitution of another individual or entity for the deceased defendant or allow the appeal to proceed without substitution. In eight states, the court may substitute another individual or entity for the deceased defendant. Carlin, 249 P.3d at 763 (allowing substitution of the defendant's estate); Makaila, 897 P.2d at 972 (allowing substitution at the motion of the defendant's personal representative or the State); Surland, 895 A.2d at 1045 (allowing substitution at the motion of the defendant's estate); Gollott, 646 So.2d at 1304 (allowing substitution, including defendant's attorney as the defendant's successor, upon any party's motion); Salazar, 945 P.2d at 1004 (allowing substitution at the motion of any party or the court); McGettrick, 509 N.E.2d at 382 (allowing substitution of any person, including the defendant's attorney, on the motion of the defendant's personal representative or the State); Bevel, 717 S.E.2d at 795-96 (recognizing that "[i]t is conceivable that in a case where a criminal conviction could have a significant negative impact [**19] on a deceased defendant's estate or the rights of his heirs . . . the appeal could be prosecuted by a substituted party"); Webb, 219 P.3d at 699 (allowing substitution upon the motion of the deceased defendant's heirs).

In the other six states, the courts permit the appeal to continue notwithstanding the defendant's death, but have not required that a party be substituted for the defendant. Jones, 551 P.2d at 804 (resolving the appeal on its merits, not mentioning substitution); Clements, 668 So.2d at 982 (holding that the appeal may proceed for good cause and recognizing the interest of the defendant's estate, but not specifying whether substitution is required); Gartland, 694 A.2d at 568-69 (indicating that a motion for substitution of parties is permissible but not required); Walker, 288 A.2d at 744 (resolving the appeal on its merits, not mentioning substitution); Christensen, 866 P.2d at 535 n.7 (noting that "since [the defendant's] death, no substitution of a party had been made. While not an issue on appeal, the issue may need to be addressed on remand"); McDonald, 424 N.W.2d at 415 (failing to address the issue of substitution).

Court potentially leaves errors uncorrected which will ultimately work to the detriment of our justice system." Gollott, 646 So. 2d at 1304; see also McGettrick, 509 N.E.2d at 382 (proceeding with the appeal "furthers the public policy of deciding cases on their merits"). Also, "because collateral proceedings may be affected by criminal [**22] proceedings . . . it is in the interest of society to have a complete review of the merits of the criminal proceedings." McDonald, 424 N.W.2d at 414; see also Jones, 551 P.2d at 804 ("Oftentimes rights other than those of an individual defendant are involved. The right to inherit, or to take by will . . . may be affected. The family of the defendant and the public have an interest in the final determination of a criminal case." (citation omitted)). Finally, "[t]he interests of the victim and the community[] . . . in condemning the offender persist even after the defendant's death." Carlin, 249 P.3d at 764.

In sum, courts across the country take different approaches when a defendant dies while his appeal of right of his conviction is pending. But the majority apply the doctrine of abatement *ab initio*. With this case law in mind as context, we turn to the parties' arguments.

II.

Burrell argues that we adopted the doctrine of abatement *ab initio* in our 2010 order in State v. Hakala, No. A08-0215, Order, 2010 Minn. LEXIS 307 (Minn. filed June 2, 2010), and that *Hakala* controls the outcome of this case and requires abatement. The State argues that *Hakala* does not control the outcome here. If we conclude that *Hakala* [**23] is not controlling, Burrell urges that we should align ourselves with the majority rule, adopt the doctrine of abatement *ab initio*, and direct that the prosecution against him be dismissed. The State urges us to affirm the court of appeals and dismiss Burrell's appeal, leaving his convictions intact. While we disagree that *Hakala* controls, we agree with Burrell that his convictions should be abated and that the prosecution against him should be dismissed.

A.

We turn first to Burrell's argument that *Hakala* requires that Burrell's convictions be abated. In *State v. Hakala*, the defendant was convicted of three counts of criminal sexual conduct after a jury trial. 763 N.W.2d 346, 348 (Minn. App. 2009). The court of appeals reversed his convictions in a published opinion. Id. at 353. We granted the State's petition for review and heard oral argument on the merits of the appeal on November 9, 2009. Hakala died on March 20, 2010, before an opinion was issued, and his attorney filed a motion asking us to "discharge the petition for review, dismiss the appeal as moot, and dismiss all charges against [Hakala] . . . under the doctrine of abatement." State v. Hakala, No. A08-0215, Order, 2010 Minn. LEXIS 307, *1 (Minn. filed June 2, 2010) [**24]. The State opposed the motion, agreeing that the case was moot but urging us to find that the case was functionally justiciable and issue an opinion. [*468] *Id.* Relying on *United States v. Edwards*, which we described as applying "the doctrine of abatement when a defendant's conviction was reversed by the court of appeals on direct appeal and the defendant died after certiorari was granted," we dismissed Hakala's appeal as moot, vacated his convictions, and remanded to the district court for dismissal of the complaint. Hakala, 2010 Minn. LEXIS 307 at *1 (citing United States v. Edwards, 415 U.S. 800, 801 n.1, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974)).

Burrell argues that *Hakala* controls our analysis here because the facts of his case are materially indistinguishable from the facts in *Hakala*. To support his argument, Burrell emphasizes that in both cases, the opinion of the lower court was of no force because review had been granted by a higher court. The State, on the other hand, contends that *Hakala* is materially distinguishable from this case because Hakala died pending discretionary review of a divided court of appeals' opinion reversing his conviction and Burrell died pending his appeal of right before any appellate review [**25] had occurred. We agree with the State.

Hakala is materially distinguishable from this case because at the time of Hakala's death, his convictions had been reversed by the court of appeals and a new trial had been ordered. 763 N.W.2d at 353. By contrast, at the time of Burrell's death, his convictions had not been reversed by the court of appeals. This factual distinction is important to application of the doctrine of abatement *ab initio*. When a person, like the defendant in *Hakala*, dies after a final judgment of conviction has been reversed by the court of appeals, the case for abating the prosecution *ab initio* is strongest. See Edwards, 415 U.S. at 801 n.1 (abating the prosecution *ab initio* when the court of appeals had reversed the conviction). In such a situation, the defendant is denied more than *a resolution* of the merits of his appeal; he is denied *the benefit* of his successful appeal. The reversed convictions in *Hakala* provided a compelling reason to abate the prosecution *ab initio*. That reason is not present in this case, and we therefore hold that *Hakala* does not control our analysis of the abatement question presented here.

B.

We turn next to Burrell's alternative argument. [**26] Burrell argues that if we conclude, as we have, that *Hakala* is not controlling, we should recognize abatement in this case because Burrell died while his appeal of right was pending. The State argues that we should dismiss Burrell's appeal and not adopt the doctrine of abatement *ab initio*. After careful consideration, we conclude that Burrell's prosecution should be abated *ab initio*.

HN7[↑] Two primary considerations—the "finality principle" and the "punishment principle"—have informed those courts that have adopted abatement *ab initio*. United States v. Estate of Parsons, 367 F.3d 409, 413 (5th Cir. 2004). First, with regard to finality, courts recognize that " 'the interests of justice ordinarily require that [a defendant] not stand convicted without resolution of the merits of an appeal' " because resolution of an appeal is an integral part of our criminal justice system for finally adjudicating guilt or innocence. United States v. Wright, 160 F.3d 905, 908 (quoting United States v. Pogue, 19 F.3d 663, 665, 305 U.S. App. D.C. 224 (D.C. Cir. 1994)); *see also* Estate of Parsons, 367 F.3d at 413-14 ("The finality principle reasons that the state should not label one as guilty until he has exhausted his opportunity [**27] to appeal. . . . [N]either the state nor affected parties should enjoy the fruits of an untested conviction."). Second, with regard to punishment, "to the extent that the [*469] judgment of conviction orders incarceration or other sanctions that are designed to punish the defendant, that purpose can no longer be served" after the defendant has died. Wright, 160 F.3d at 908; *see also* United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977) ("[A]n appeal of right taken from a final judgment of conviction becomes moot because of the death of the appellant."). These same two considerations lead us to conclude that we should abate Burrell's prosecution.

With respect to the principle of finality, we have never held that a defendant has a constitutional right to appellate review. *See* Carlton v. State, 816 N.W.2d 590, 614 (Minn. 2012) (assuming without deciding that the Minnesota Constitution provides the right to one review); Spann v. State, 704 N.W.2d 486, 491 (Minn. 2005) (explaining that HN8[↑] a defendant does not have a constitutional right to appeal under the United States Constitution). But Minnesota law plainly recognizes the important role that the defendant's right to appeal from a judgment [**28] of conviction plays in our criminal justice system. *See* Hutchinson v. State, 679 N.W.2d 160, 162 (Minn. 2004) (recognizing that HN9[↑] a conviction is not final until "a judgment of conviction has been rendered" and "the availability of appeal exhausted") (quoting State v. Lewis, 656 N.W.2d 535, 538 (Minn. 2003)). For example, in *Spann*, we held that an agreement in which the defendant waived his right to appeal from the judgment of conviction in order to secure a favorable sentencing recommendation from the State was invalid "based on public policy and due process considerations." 704 N.W.2d at 493. We recognized that HN10[↑] "[t]he right to appeal implicates not only matters personal to the defendant, but broader issues as well. Once the defendant is convicted, institutional concerns that the conviction was fair and proper become paramount." *Id.*

Our rules of procedure likewise reflect the importance of the defendant's right to appeal from a judgment of conviction in our system. Our rules expressly provide that HN11[↑] a criminal defendant has an appeal as of right from any adverse final judgment. Minn. R. Crim. P. 28.02, subd. 2(1). This rule reflects that appellate review as of right for a convicted defendant [**29] is an integral part of our system of criminal justice.

In short, HN12[↑] an appellate court's resolution of a timely filed appeal as of right from a final judgment of conviction is an integral part of our system in Minnesota for finally adjudicating a defendant's guilt or innocence. When, as here, a convicted defendant has exercised his right to review but the appellate court has not yet decided the merits of that appeal, the doctrine of abatement *ab initio* ensures that the defendant is not labeled "as guilty" until he has exhausted his appeal as of right. Estate of Parsons, 367 F.3d at 413.

With respect to the punishment principle, the fact that it is impossible to punish Burrell—a deceased defendant—also supports the adoption of abatement *ab initio*. Indeed, the State has conceded that it cannot recover the fine that the district court imposed in this case, and that the fine must be "vacated."

We acknowledge, as other courts have recognized, that when a victim has been awarded restitution, the principles discussed above may not weigh in favor of abatement *ab initio*. *See* United States v. Christopher, 273 F.3d 294, 299 (3d. Cir. 2001) ("Historically, restitution, an equitable remedy, was intended [**30] to reimburse a person wronged by the actions of another . . . . We are persuaded that abatement should not apply to the order of restitution . . . and thus, it survives against the estate of the deceased convict."); United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984)

[*470] (abating the conviction but upholding the order for restitution). But there is no victim in this case who was awarded restitution, and so we need not consider and therefore do not decide how an appellate court should resolve the abatement issue in such a circumstance.

Like the majority of courts that have considered this question, we conclude that HN13[↑] when a defendant has taken an appeal as of right from a final judgment of conviction in which there has been no restitution awarded and death deprives the accused of a decision on the merits, the prosecution should be abated *ab initio*. We therefore reverse the court of appeals' denial of the abatement motion, vacate Burrell's convictions, and remand to the district court with instructions to dismiss the complaint.

Reversed, convictions vacated, and remanded.

WRIGHT, J., took no part in the consideration or decision of this case.

LILLEHAUG, J., not having been a member of this [**31] court at the time of submission, took no part in the consideration or decision of this case.

Dissent by: DIETZEN

Dissent

DIETZEN, Justice (dissenting).

I respectfully dissent. In my view, the court's adoption of the abatement *ab initio* rule that eliminates a criminal conviction in favor of a deceased defendant turns a blind eye to the rights of society and the victims of crimes, and ignores the trend in the law against this extreme result. Instead, the court should adopt the more rational rule of allowing the appellate court to substitute a successor in interest for the deceased defendant and consider the merits of the appeal. Therefore, I would reverse the court of appeals' decision and remand the case to that court to allow Burrell's successors in interest to move for substitution and a hearing on the merits of his appeal. To explain my dissent, I will set forth in detail both the reasons why the majority's abatement *ab initio* rule lacks merit, and the advantages of the substitution rule that I propose.

I.

Burrell was convicted of two counts of aggravated forgery and appealed his convictions, alleging insufficient evidence of any intent to defraud, defective jury instructions, error in allowing an alternate [**32] juror to deliberate with the jurors, prosecutorial misconduct, and error in the imposition of multiple sentences. The State joined Burrell in his request to vacate one of his sentences. Before the court of appeals could rule on the merits of Burrell's appeal, however, Burrell died.

The majority justifies adoption of an abatement *ab initio* rule that eliminates Burrell's convictions on two grounds: (1) the defendant should not stand convicted without resolution of the merits of his appeal, and (2) the purpose of punishing the defendant can no longer be served because the defendant is deceased. The majority's justifications for its new rule lack merit.

It is true that a conviction is not final until "a judgment of conviction has been rendered" and "the availability of appeal exhausted." Hutchinson v. State, 679 N.W.2d 160, 162 (Minn. 2004) (citing State v. Lewis, 656 N.W.2d 535, 538 n.2 (Minn. 2003)). Indeed, "an appeal plays an integral part in the judicial system for a final adjudication of guilt or innocence." State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 413 (Wis. 1988). "[A] defendant who dies pending appeal," therefore, "should not be deprived of the safeguards that an appeal provides." *Id.*; [**33] *see also* City of Newark v. Pulverman, 12 N.J. 105, 95 A.2d 889, 894 (N.J. [*471] 1953) (holding that there is no mootness insofar as the family of a deceased defendant is concerned and his legal representative should have the opportunity to establish on appeal that the conviction was wrongful).

But unless overturned by the appellate court, a defendant's conviction remains presumptively valid and the State has a compelling interest in maintaining the judgment of conviction. *See* State ex rel. Rajala v. Rigg, 257 Minn. 372, 382, 101 N.W.2d 608, 614 (1960) ("The judgment of conviction . . . is presumptively valid unless it appears affirmatively from the record that the court was without jurisdiction."). And "because there are so very few instances in which the problem [of a deceased defendant] arises," continuing the appeal to achieve these public policy goals "should create no appreciable burden for anyone." Surland v. State, 392 Md. 17, 895 A.2d 1034, 1045 (Md. 2006). Because Burrell's convictions have not been overturned by an appellate court, they remain presumptively valid, and the interests of justice favor not abating the convictions.

Significantly, English common law recognized that the

interests of justice favored [**34] allowing the defendant's heirs the right to continue his appeal. *See* Bevel v. Commonwealth, 282 Va. 468, 717 S.E.2d 789, 795 (Va. 2011) (recognizing the defendant's right to continue his appeal at common law where "an attainder of felony would not be affected by the death of the defendant, but that his executor or heirs could pursue a writ of error in his stead"); *Marsh & his Wife*, (1790) 78 Eng. Rep. 481 (Q.B.); Cro. Eliz. 225 ("An executor may bring a writ of error to reverse the outlawry for felony of his testator."); 4 William Blackstone, *Commentaries on the Laws of England* 391-92 (1807); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 654 (John Curwood, ed., 8th ed. 1824); Timothy A. Razel, Note, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 Fordham L. Rev. 2193, 2198 (2007) (stating that courts have only applied abatement *ab initio* since the late nineteenth century and noting that some states have never adopted the doctrine of abatement *ab initio*). The origins and justifications for abatement *ab initio* are, at best, murky, and therefore this court need not adopt the unsound doctrine of abatement *ab initio*. *See* Fleeger v. Wyeth, 771 N.W.2d 524, 529 (Minn. 2009).

The [**35] majority also argues that a judgment of conviction is primarily designed to punish the defendant, that the defendant is deceased, and therefore the purpose of the judgment of conviction can no longer be served. This argument ignores the broader purpose of the criminal justice system, which recognizes not only the constitutional rights of the defendant, but also the legitimate right of society and the victims of crimes to retribution. *See* Kennedy v. Louisiana, 554 U.S. 407, 420, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."); *see also* Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 2028, 176 L. Ed. 2d 825 (2010). Retribution serves the purpose of having a convicted defendant pay for the crime committed and the negative impact of that crime on society and the victims of the crime. In *Graham* the Supreme Court observed that "[s]ociety is entitled to impose severe sanctions . . . to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." Graham, 560 U.S. at 71, 130 S. Ct. at 2028.

Our criminal justice system recognizes the rights of victims in criminal prosecutions. Morris v. Slappy, 461 U.S. 1, 14, [*472] 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) [**36] ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims."); *see also* Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 Cath. U. L. Rev. 1135, 1152-53, 1158-63 (2007). Other courts have recognized that "[t]he interests of the victim . . . in condemning the offender persist even after the defendant's death." State v. Carlin, 249 P.3d 752, 764 (Alaska 2011). Abating a defendant's conviction denies victims "fairness, respect and dignity" and prevents "finality and closure." State v. Korsen, 141 Idaho 445, 111 P.3d 130, 135 (Idaho 2005). Crime victims are also entitled to "receiv[e] compensation for loss due to criminal activity" and "obtain[] retribution against the person who wronged them" by seeing the perpetrator justly convicted of the crime. Razel, supra, at 2209-10; *see also* People v. Peters, 449 Mich. 515, 537 N.W.2d 160, 164 (Mich. 1995) (recognizing that crime victims "suffer[] significant losses as a result of [a] defendant's criminal conduct"). Because the victim may be entitled to restitution, "a criminal appeal, even after the defendant has died, may remain 'a present, live controversy' " with "consequences for the defendant's [**37] estate." Carlin, 249 P.3d at 764. Also, "collateral proceedings," including any civil action brought by the victims, "may be affected by criminal proceedings." McDonald, 424 N.W.2d at 414; *see also* State v. Jones, 220 Kan. 136, 551 P.2d 801, 804 (Kan. 1976) ("Oftentimes rights other than those of an individual defendant are involved. The right to inherit, or to take by will . . . may be affected. The family of the defendant and the public have an interest in the final determination of a criminal case." (citation omitted)).

The majority's rule turns a blind eye to the interests of society and the victims of the crimes involved. A proposed rule allowing substitution for the deceased defendant and consideration of the merits of the appeal respects not only the constitutional rights of the defendant, but also the interests of society and the victims of the crime involved.

II.

I propose the court adopt a rule that allows substitution of the defendant's successor in interest and continuation of the appeal. Substitution and continuation of the defendant's appeal afford the defendant, through his successor in interest, the safeguards of an appeal. Additionally, substitution and continuation "preserve[] both [**38] the presumptive validity of the judgment and the ability of the defendant, through a substituted party appointed for his or her benefit, to maintain the defendant's challenge to it." Surland v. State, 895 A.2d at 1034, 1045 (Md. 2006). Finally, "no prejudice is suffered by the deceased or his interests in allowing the

appeal to continue" when "[t]he [d]efendant had an opportunity to participate fully in his appeal" prior to his death. [9] State v. Salazar, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996, 1004 (N.M. 1997). The virtues of continuing the defendant's appeal have been recognized by the fourteen [*473] states that now allow their appellate courts to consider the merits of a deceased criminal defendant's appeal in most circumstances. State v. Carlin, 249 P.3d 752, 762 (Alaska 2011); State v. Clements, 668 So. 2d 980, 982 (Fla. 1996); State v. Makaila, 79 Haw. 40, 897 P.2d 967, 972 (Haw. 1995); State v. Jones, 220 Kan. 136, 551 P.2d 801, 804 (Kan. 1976); Surland v. State, 392 Md. 17, 895 A.2d 1034, 1045 (Md. 2006); Gollott v. State, 646 So. 2d 1297, 1303-04 (Miss. 1994); State v. Gartland, 149 N.J. 456, 694 A.2d 564, 569 (N.J. 1997); State v. Salazar, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996, 1004 (N.M. 1997); State v. McGettrick, 31 Ohio St. 3d 138, 31 Ohio B. 296, 509 N.E.2d 378, 382 (Ohio 1987); Commonwealth v. Walker, 447 Pa. 146, 288 A.2d 741, 744 (Pa. 1972); [**39] State v. Christensen, 866 P.2d 533, 536-37 (Utah 1993); Bevel v. Commonwealth, 282 Va. 468, 717 S.E.2d 789, 795-96 (Va. 2011); State v. Webb, 167 Wn.2d 470, 219 P.3d 695, 699 (Wash. 2009); State v. McDonald, 144 Wis. 2d 531, 424 N.W.2d 411, 414-15 (Wis. 1988).

As the Maryland Court of Appeals recognized in *Surland*, "the public generally" has an interest in criminal appeals that supports substitution and continuation of a deceased criminal defendant's appeal. Surland, 895 A.2d at 1045. [**40] The continuation of the appeal is helpful because "our lawmakers and practitioners need to be made aware of errors committed at the trial court level. Leaving convictions intact without review by [an appellate court] potentially leaves errors uncorrected which will ultimately work to the detriment of our justice system." Gollott, 646 So. 2d at 1304; *see also* McGettrick, 509 N.E.2d at 382 (proceeding with the appeal "furthers the public policy of deciding cases on their merits"); McDonald, 424 N.W.2d at 414 ("[I]t is in the interest of society to have a complete review of the merits of the criminal proceedings.").

In sum, I dissent from the majority's decision to abate *ab initio* Burrell's convictions for two reasons. Abating a criminal conviction without consideration of the merits of the appeal ignores the legitimate rights of society and the victims of the crimes involved. My proposed rule allowing substitution of a successor in interest for a deceased defendant and consideration of the merits of the appeal is well grounded in the common law; and the rule respects the constitutional rights of the defendant, and the interests of society and the victims of the crimes. Consequently, I [**41] would remand this case to the court of appeals for consideration and resolution of the merits of the appeal, including the correction of any errors that may have occurred during trial.

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[9] The defendant's interests would also be protected in the event the appellate court reverses his convictions because in that instance the defendant's convictions would abate *ab initio* due to the trial court's inability to retry a deceased defendant. See State v. Gartland, 149 N.J. 456, 694 A.2d 564, 569 (N.J. 1997) ("The defendant can no longer be retried for the crime."); State v. Christensen, 866 P.2d 533, 537 (Utah 1993) ("If there is a reversal or a remand, defendant cannot be retried . . . ."); State v. Webb, 167 Wn.2d 470, 219 P.3d 695, 699 (Wash. 2009) ("If the substituted party appellant is successful in showing that defendant's conviction must be reversed, then, because remand for a retrial is impossible, the conviction and all associated financial obligations must be abated.").

Certificate of Service

I hereby certify that I have today served upon counsel for the defendant a copy of Commonwealth's Petition for Direct Appellate Review, with Record Appendix, by mailing a copy, postage prepaid, to the following address:

Linda J. Thompson
John M. Thompson
THOMPSON & THOMPSON, P.C.
1331 Main Street, Suite 320
Springfield, MA 01103

Shoshana E. Stern
Assistant District Attorney
Bristol District
BBO #667894
P.O. Box 973
888 Purchase Street
New Bedford, MA 02741
(508) 997-0711

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